



OFFICE OF THE POLICE COMMISSIONER
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December 13, 2013

Memorandum for: Deputy Commissioner Trials

Re: **Police Officer Adhyl Polanco**
Tax Registry No. 939237
Police Service Area 2
Disciplinary Case Nos. 2010-456 & 2011-5089

The above named member of the service appeared before Deputy Commissioner Martin G. Karopkin on June 18, 2012, June 25, 2012, October 26, 2012, November 8, 2012, February 7, 2013 and March 5, 2013 and was charged with the following:

DISCIPLINARY CASE NO. 2010-456

1. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, having been directed, on (2) occasions, by New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, to exit the ambulance he was in and that another Member of Service would escort his partner to the hospital, did fail and neglect to comply with said directive.

PG 203-03, Page 1, Paragraph 2

**COMPLIANCE WITH ORDERS
GENERAL REGULATIONS**

2. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, was discourteous to on-duty New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, to wit: after said Lieutenant directed said Police Officer to exit the ambulance, said Police Officer did become irate and stated, "I'm going with my partner. Lieutenant Valenzano you do what you have to do, I'm going with him."

PG 203-09, Page 1, Paragraph 2

**COMPLIANCE WITH ORDERS
GENERAL REGULATIONS**

3. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, after having been directed by New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, to surrender his gun and shield and return to the stationhouse, did fail and neglect to comply with said directive.

PG 203-03, Page 1, Paragraph 2

**COMPLIANCE WITH ORDERS
GENERAL REGULATIONS**

POLICE OFFICER ADHYL POLANCO**DISCIPLINARY CASE NOS.****2010-456 & 2011-5089**

4. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, was discourteous to on-duty New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, to wit: after said Lieutenant directed said Police Officer to surrender his gun and shield, said Police Officer stated to said Lieutenant, "You don't have the authority to do that."

PG 203-09, Page 1, Paragraph 2**COMPLIANCE WITH ORDERS
GENERAL REGULATIONS**

5. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did yell at and push New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, with both hands on said Lieutenant's chest.

PG 203-10, Page 1, Paragraph 5**PUBLIC CONTACT – PROHIBITED
CONDUCT GENERAL REGULATIONS**

6. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, after having been directed to do so by New York City Police Department Sergeant Robert Rodriguez, Tax No. 926013, to surrender his gun, did fail and neglect to comply with said directive.

PG 203-03, Page 1, Paragraph 2**COMPLIANCE WITH ORDERS
GENERAL REGULATIONS****DISCIPLINARY CASE NO. 2011-5089**

1. Said Police Officer Adhyl Polanco, assigned to the Military and Extended Leave Desk, on or about April 24, 2009, in the confines of the 41st Precinct, knowingly made a false statement, which he did not believe to be true, in a written instrument bearing a legally authorized form notice stating that false statements are punishable, to wit: said Police Officer acknowledged issuing two (2) Criminal Court Summons for violations he did not personally observe, and signing "I personally observed the commission of the offense charged herein, false statements made herein are punishable as a Class A misdemeanor pursuant to section 210.45 of the NYS Penal Law, affirmed under penalty of Perjury," on said Summons.

NYS PENAL LAW 210-45**PERJURY AND RELATED OFFENSES
MAKING A PUNISHABLE FALSE
WRITTEN STATEMENT**

POLICE OFFICER ADHYL POLANCO

DISCIPLINARY CASE NOS.
2010-456 & 2011-5089

In a Memorandum dated August 8, 2013, Deputy Commissioner Karopkin found Police Officer Polanco Guilty of Specification Nos. 2, 4, 5, 6, Guilty In Part of Specification No. 3, and Not Guilty of Specification No. 1, in Disciplinary Case No. 2010-456 and Dismissed Specification No. 1 in Disciplinary Case No. 2011-5089. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of issues and circumstances in this matter and deem that a greater penalty is warranted. Therefore, the Respondent is to forfeit thirty (30) suspension days previously served, thirty (30) vacation days, and be placed on a one year dismissal probation period, as a disciplinary penalty.



Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

*The
City
of
New York*

August 8, 2013

MEMORANDUM FOR: Police Commissioner

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Tax Registry No. 939237
Police Service Area 2
Disciplinary Case Nos. 2010-456 & 2011-5089

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P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS
GENERAL REGULATIONS

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P.G. 203-09, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS
GENERAL REGULATIONS

¹ Written summations were submitted in this case. The Respondent's summation was submitted on April 5, 2013 and the Department's summation on April 26, 2013, which was the date on which decision was reserved.

3. Said Police Officer Adhyl Polanco, while on duty and assigned to the 41st Precinct, on or about December 12, 2009, after having been directed by New York City Police Department Lieutenant Andrew Valenzano, Tax No. 923294, to surrender his gun and shield and to return to the stationhouse, did fail and neglect to comply with said directive.

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a Class A misdemeanor pursuant to section 210.45 of the NYS Penal Law, affirmed under penalty of Perjury," on said Summons.

**NYS PENAL LAW 210-45 PERJURY AND RELATED OFFENSES
MAKING A PUNISHABLE FALSE WRITTEN
STATEMENT**

The Department was represented by Rudolph Behrmann, Esq., Department Advocate's Office, and Respondent was represented by Lauriano Guzman, Esq. and Jose A. Muniz, Esq.

Respondent through his counsel entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2010-456

Respondent is found Guilty of Specification Nos. 2, 4, 5 and 6, Guilty in Part of Specification No. 3 and Not Guilty of Specification No. 1.

Disciplinary Case No. 2011-5089

It is recommended that the single specification in this case be Dismissed.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Detectives Michael Ryan and John Kenny, Emergency Medical Technician Carlos Guardon, Sergeant Robert Rodriguez, Police Officers Victor Marrero, Danny Aquino and Joel Gomez, Lieutenant Daniel Cutter, and Captain Andrew Valenzano.

Detective Michael Ryan

Ryan is a detective who has been with the Department for 20 years. For the past 13 years he has been assigned to the Emergency Services Unit (ESU), Squad 4. At about 1718 hours on December 12, 2009, he was in the vicinity of [REDACTED] [REDACTED]. At that time and location he observed an argument between Respondent and (then) Lieutenant Valenzano.² He stated that officers from the precinct and from his unit stepped in to calm the situation.

Ryan was at the location to respond to call involving an officer who was having chest pains. When he arrived other units from the 41 Precinct as well as several Emergency Medical Service (EMS) units were already on the scene. The officer with chest pains was in the back of an ambulance being attended to by members of EMS.

Ryan said that at that point he was just standing by in the event an escort was needed. He stated that they were waiting for other units to disburse because their vehicle was blocked so that they could get their truck off the road. He stated that while he was waiting, his attention was drawn to the argument between Respondent and Valenzano because he heard raised voices and yelling. He heard Respondent yelling "that's my partner, that's my partner." He did not see any actual fighting between the two but he saw Respondent raise his hands.

At some point, Valenzano directed ESU to remove Respondent's firearms. Ryan testified that at that point Respondent was seated "in the back of a precinct radio car [Radio Motor Patrol (RMP)]." He and his partner went over to the car. His partner spoke with Respondent who did surrender his firearm.

² Valenzano who was a lieutenant at the time of this incident has since been promoted to Captain.

On cross-examination, Ryan agreed that he had not heard what happened before the incident nor did he see any physical altercation between Respondent and Valenzano however he did see Respondent "flail his arms." He did not recall hearing Valenzano ordering Respondent to surrender his firearm before he ordered ESU to get it.

Ryan said that a few of the officers at the scene tried to calm things down and they led Respondent away and urged him to get away from the ambulance and into the RMP. Ryan said he was 15 or 20 feet down the sidewalk when his attention was initially drawn to the events. Ryan agreed that Valenzano said that Respondent was to be treated like an Emotionally Disturbed Person (EDP) if he did not surrender his firearm. Ryan stated that while Respondent did not seem to want to hurt himself, he was agitated and aggressive. He reiterated that Respondent's tone was aggressive and that Respondent was angry but not emotionally disturbed.

Ryan did not see Valenzano order Respondent out of the ambulance. He acknowledged having used the word "scruffle" and said that by that he meant that as Respondent was saying "my partner, my partner" he was raising his hands in an aggressive manner. He agreed that when officers have to step in to separate people, that is what he means by "scruffle."

With regard to the point in time that Respondent was in the vehicle, Ryan said he was alone in the vehicle, that his partner spoke to him and that he did not recall Valenzano coming to the vehicle or getting into an argument with Respondent at that point. He stated that the entire incident took a minute or two. On re-direct examination, Ryan stated that as Respondent flailed his arms Valenzano stepped back.

Detective John Kenny

Kenny is a detective who has been with the Department for 16 years. He has been with ESU for about 8 years. On December 12, 2009 at about 1718 hours, he was in the vicinity of [REDACTED].

Kenny said he responded to a call involving a member of the service having chest pains. He checked the condition of the officer who was in the back of the ambulance. He said that at that time there was an altercation. He saw Respondent who was "upset" and "irate." Kenny testified that Respondent was yelling and tried to lunge at Valenzano.

Kenny said that he was standing close by and that he "kind of got in between the two and tried to restrain the officer." Kenny explained that he put his hand up to keep Respondent from getting past him to Valenzano. Kenny noted that Valenzano stepped backwards away from Respondent. Kenny testified that at that point, "I was just basically trying to calm the officer down. He was very upset..."

Kenny explained that he was told to get Respondent's firearm from him. Respondent at that point was seated in an RMP. Describing the scene Kenny testified:

I told him, I said I have a direct order from the supervisor to take your firearm. I basically told him that he, you know, if he didn't comply with me, that we were going to have to treat him like an emotionally disturbed person...I had to calm him down a little bit and once he finally calmed down, he complied with that order and he gave me his service weapon. At that point I asked him if he had any other firearms on him, because sometimes police officers carry more than one gun. He said he didn't have his gun on him. It was in his locker. At that point I asked him again, I told him, I said, listen I'm giving you the respect that you're a police officer and I don't want to pull you out of the car and frisk you. So I'm taking your word that you're giving me all the firearms that you have. I said I'm asking you again do you have another firearm on you. He said no, I don't have one. At this point the guy I was working with, Mike Ryan, was – he had a different angle, and he saw a little bit of a shoulder holster strap. He asked the officer,

he said, I see you have a shoulder holster, do you have a firearm, and he finally gave that firearm up.

On cross-examination, Kenny said that Respondent had been a little misleading and he did not come forward with the fact that he had a second firearm. Kenny conceded that at his official Department interview regarding this matter he did not mention Respondent's failure to immediately hand over the second firearm. He did not recall being asked about that. Kenny did agree that he was asked at the interview if he had anything else to add and that he had answered in the negative.

Kenny did not recall Valenzano yelling back at Respondent nor did he recall what was being said. Kenny acknowledged that as he walked with Respondent from the ambulance to the RMP, he held onto Respondent's arm to restrain him. Kenny said other officers were trying to calm him down. He said that before he started to restrain Respondent, other officers held him by the torso to restrain him. He said there were at least three or four doing this before he arrived. He said that Respondent was about six feet from Valenzano and it was at that point that Respondent attempted to lunge at him.

Kenny stated that as Respondent walked to the vehicle a group of officers from the precinct were both pushing and pulling him along. He said that during this time Valenzano stated that Respondent was to be taken to the 41 Precinct. This was not, he believed, the first order Valenzano gave. Kenny affirmed that Valenzano had told him that if Respondent did not surrender his firearm he was to be treated as an EDP. Kenny said that he did not treat Respondent as an EDP even though he was behaving irrationally. Kenny said when Respondent finally calmed down he was cooperative.

Kenny said the order to take Respondent's firearm was given to him as Respondent was being taken to the RMP. He said that both he and his partner approached the driver side of the vehicle but was not sure stating that he thought his partner was right next to him but that he did not recall.

Kenny said he did not actually see Respondent touch Valenzano. When he first observed the argument between Respondent and Valenzano they were outside the ambulance toward the rear.

Emergency Medical Technician Carlos Guardon

Guardon is an emergency medical technician (EMT) with the New York City Fire Department. He has been employed as such for three years. On December 12, 2009 he was dispatched to the vicinity of [REDACTED]. The call had been a "cardiac call" for an RMP. When he arrived a number of officers were removing the sick officer from a police car. He was complaining about chest pain. He brought the officer into the ambulance, put him on a stretcher and gave him some oxygen.

Guardon testified that he observed a verbal altercation between Respondent and a lieutenant (Valenzano). He said that he had been in the rear of the ambulance and as he was getting out he observed the altercation. He did not recall exactly what it was about but he did remember hearing the lieutenant asking the officer for his firearm and shield. The officer was worried about his partner who was in the ambulance. Guardon said that Valenzano placed his hand on the officer's shoulder and the officer (Respondent) pushed it away. He described Respondent's push as "like a defensive push" and he said

Valenzano stepped forward. He clarified by saying that Valenzano had been pushed back and he “guessed” that Valenzano’s initial reaction was to step up.

Guardon said Valenzano “just stood there and they got separated by the other officers.” He said that Respondent had told Valenzano that he did not have any authority over him.

Guardon said Respondent was taken by other officers to an RMP while the Valenzano remained there. Guardon said he had stepped out because an EMS unit with paramedics had arrived and they were providing further treatment for the patient and it was crowded inside. He described his position as being at the rear of the ambulance, on the outside. He described Respondent as “upset” and “angry.”

On cross-examination Guardon said he did not recall seeing Respondent inside the ambulance. He said that he was about five feet away from Respondent at the time of the altercation and that they were both about five feet from the rear of the ambulance.

Guardon agreed that when he first heard the argument there was shouting from both Respondent and Valenzano and that the first one to make physical contact was Valenzano. He did not recall if it was a grab or if Valenzano was just placing his arm on Respondent’s shoulder.

He recalled stating during an official Department interview that a sergeant grabbed Respondent by the arm. He said he now recalls Valenzano grabbed Respondent by the arm and that Respondent’s reaction was to push off. He said that immediately after other officers came in between them.

Guardon said that Respondent’s statement that the lieutenant had no authority over him came after he pushed Valenzano’s hand off his arm. He also said the demand

for Respondent's firearm and shield took place before Valenzano grabbed Respondent's arm. He did not hear Respondent refuse to turn over his firearm and shield.

When asked about the grabbing of Respondent's arm by Valenzano, Guardon said that it was not with force. When asked if Respondent had said to Valenzano that he did not have the right to touch him, Guardon said that he had heard Respondent say you have no authority over me and that he did not hear Respondent say you have no right to touch me.

Guardon said that he observed Respondent being escorted from the ambulance to the RMP. He did not see Respondent lunge at the lieutenant or the lieutenant lunge at Respondent.

Sergeant Robert Rodriguez

Sergeant Rodriguez³ has been a member of the Department for 12 years and he has been a sergeant for the last four years. He has served as a sergeant at the 41 Precinct for four years. On December 12, 2009 he was the patrol supervisor. At about 1700 hours he responded to the vicinity of [REDACTED]. He was headed towards a vehicle checkpoint near the Bruckner Boulevard in a heavily trafficked area of the precinct. While he was supervising officers at the checkpoint he observed Police Officer [REDACTED] bending over and making a motion like he was going to throw up. He was clearly ill. Sergeant Rodriguez went over to the officer who kept touching his chest so he called for an ambulance. An ambulance responded within a few minutes. ESU also responded. Valenzano also was present. Sergeant Rodriguez observed Valenzano go to the ambulance where Police Officer [REDACTED] had been taken.

³ [REDACTED]
[REDACTED]

Sergeant Rodriguez testified that at some point he and Valenzano were clearing a route so that the ambulance could leave the scene and go to the hospital. Respondent got into the ambulance and announced that he was going to accompany Officer [REDACTED] to the hospital. Valenzano told Respondent that he was not going to the hospital. Respondent, Sergeant Rodriguez testified, responded that Valenzano could do anything he wanted but he was going to the hospital with his partner. Sergeant Rodriguez said that Valenzano repeated himself several times and appeared to be giving an order.

According to Sergeant Rodriguez, Valenzano then got close to the ambulance and told Respondent to surrender his firearm and shield. He said Valenzano was then pushed towards him and that he then went between Respondent and Valenzano. Sergeant Rodriguez testified that as Respondent pushed Valenzano he said, "Get the fuck off me bitch." Sergeant Rodriguez said that this occurred right near the entrance to the ambulance. Sergeant Rodriguez said that he also asked Respondent for his firearm and shield but that Respondent did not respond to him. Sergeant Rodriguez said that Respondent was shouting and cursing and acting in a belligerent manner. He described Respondent's behavior as "very unprofessional." He also stated that Respondent did not comply with the order to surrender his firearm and shield. He described the contact Respondent made with Valenzano as "a shove" an "aggressive push." Sergeant Rodriguez said that Valenzano moved back after being pushed by Respondent.

On cross-examination, Sergeant Rodriguez said that he did not recall if he saw Respondent enter the ambulance but he did see him exit the ambulance. Sergeant Rodriguez said that during this period of time he was behind Valenzano. He stated that before the incident, he was on the side of the ambulance near the rear and that other

officers were present. He stated that Respondent was in the ambulance when the incident with Valenzano first took place. He agreed that Respondent exited the ambulance at Valenzano's order. He agreed that Valenzano was at the bottom of the ambulance steps and Respondent at the top when the shoving incident occurred. He agreed these steps were on the side of the ambulance. He said Respondent used two hands to shove the lieutenant. Sergeant Rodriguez stated the orders were given for Respondent to surrender his gun and shield both before and after the shove. Sergeant Rodriguez did not recall if anyone else had been assigned to escort Officer [REDACTED] to the hospital. He did not recall if Officer Almonte was present.

Sergeant Rodriguez did not recall hearing Valenzano give orders to anyone other than himself to remove Respondent's gun and shield. Sergeant Rodriguez denied ever holding Respondent but he saw other officers holding him back. He did not recall seeing other officers walk over to the RMP.

Police Officer Victor Marrero

Marrero is a police officer who has been with the Department for four and a half years. On December 12, 2009 he was in the vicinity of [REDACTED] [REDACTED]. He stated that he saw a physical altercation between Respondent and Valenzano. Marrero described the incident as follows:

The officer was approaching a vehicle, which is the FDNY ambulance bus, we call it a bus, and the lieutenant blocked his path, grabbed him by the shoulders and arms, turned him physically and the police officer slapped the lieutenant's hand out of his arms – off his arms.

Marrero said Valenzano told Respondent to return to the command. He then indicated that Valenzano had said that before Respondent approached the ambulance. He said all of this happened on the side of the ambulance. Marrero stated that Respondent asked Valenzano why he had put his hands on him.

Marrero further indicated that at some point he was holding Respondent back because "they were exchanging words, getting aggravated, a little frustrated." He said he felt the need to approach Respondent because he felt they were getting into a fight. He said Respondent appeared to be upset.

On cross-examination Marrero said that before the incident Respondent had been in the vicinity of the ambulance. He said that Valenzano turned him around by grabbing his shoulders and arms. As he did this he told Respondent that he had told him to go back to the command. He did not hear Valenzano ask for Respondent's shield and firearm at that time. He said he believed the ESU officers were the first ones to get between Respondent and Valenzano. He said the ESU officers held Respondent until he got there then he was helped by Police Officers Gomez and Aquino. He did not recall Valenzano yelling at Respondent, nor did he recall seeing Respondent in the ambulance. He said "there were a few of us" who walked Respondent from the ambulance to the RMP.

He stated that after they got Respondent to the car, ESU officers came over and they, according to Marrero, were given an order to "EDP" Respondent. Marrero said that after they had gotten Respondent to the RMP he got into the vehicle with Respondent. Although he did not recall it at first after looking at the minutes of his official Department

interview, he recalled that Valenzano had come over to the vehicle and had “cursed out” Respondent.

Marrero said that when the ESU officers came over they requested Respondent’s firearm. He said Respondent complied. Respondent handed over two guns to the ESU officers. He said it took Respondent about five minutes to comply with the order. He said the ESU officers wanted to calm Respondent and said that Valenzano wanted them to “EDP” him.

Police Officer Danny Aquino

Aquino has been a police officer for about three years. He was on the scene at [REDACTED] when he saw Respondent and Valenzano arguing with each other. When he heard the commotion behind the ambulance he walked over and saw Respondent who was “irate” and “angry.” He said that Respondent was upset that he wasn’t allowed to go to the hospital with his partner. He recalled Respondent saying that he wanted to go to the hospital with his partner. Aquino described Respondent as “upset.” Aquino agreed that there was an angry exchange of words. Respondent, he said was ordered to “give his guns away.” He said they convinced him to give his guns and then he was driven back to the precinct. Aquino said the guns were surrendered “on the street” and that Valenzano had given the order.

On cross-examination Aquino said that Respondent and Valenzano were two to three feet away from each other when he first saw them. He said the incident happened while they were next to the ambulance. He denied holding Respondent but said that he stood in front of him. He said he was one of the officers who walked Respondent to the

RMP. He did not recall Valenzano coming over to the RMP. He did not recall seeing Respondent exit the ambulance nor did he remember hearing Valenzano give Respondent any orders.

Police Officer Joel Gomez

Gomez is a police officer who has been in the Department for over five years. He has been assigned to the 41 Precinct for about four years. On December 12, 2009 he was in the vicinity of [REDACTED]. At about 1730 hours there was an ambulance on the scene. Police Officer [REDACTED] was in the ambulance as he was having chest pains. Gomez said that he was in the back of the ambulance looking in at Police Officer [REDACTED] when he heard a commotion, an altercation, on the right side of the ambulance. He testified: "I see [Respondent] turn around and push Lieutenant Valenzano and say, "Get your fucking hands off me."

Gomez said that he and others told Respondent to calm down and that this was not the way to go about things. Gomez described Respondent as upset but not "charging" anyone. Respondent was walked to an RMP and then driven to the precinct but Gomez did not recall where he was. He knew that he had gone to a car but he did not recall if he was in the same car with Respondent or another car. He had no knowledge of Respondent doing anything with his firearm.

On cross-examination, Gomez agreed that he did not know if Valenzano had grabbed Respondent or not. He agreed that there were other officers including ESU officers around Respondent but he did not recall who. He said Sergeant Rodriguez was on the scene but he did not know where he was. He agreed that he did not see

Respondent lunge at Valenzano. He stated that they went to calm Respondent down and that they were "hands on." He described it as an effort to calm Respondent down and soothe him.

Lieutenant Daniel Cutter

Cutter is a lieutenant who was assigned to Internal Affairs Bureau (IAB) Group 1, Special Investigations Unit (SIU). On December 14, 2009, he investigated allegations made by Respondent against McHugh and Valenzano as well as the allegations made on April 24, 2009. Respondent told Cutter that he had been suspended as retaliation for filing an earlier complaint in November, 2009, against McHugh and Valenzano. In addition, Respondent alleged that McHugh and Valenzano also ordered Respondent to write summonses and make arrests to fulfill a quota.

As part of his investigation, Cutter conducted a background check and conferred with other units such as Quality Assurance Division (QUAD) and Bronx Investigations about similar allegations about Valenzano and McHugh. Additionally, Cutter interviewed other police officers from the 41 Precinct to determine the merits of Respondent's allegations and whether these police officers were also retaliated against.

During the course of Cutter's informal conversations with Respondent, Respondent reiterated his allegations against McHugh and Valenzano and also provided a diary in which Respondent listed the dates of the alleged misconduct conducted by McHugh and Valenzano. Cutter determined that Respondent's allegations were "unfounded."

Respondent alleged that he had been retaliated against by McHugh because Respondent was a "whistle blower" and that Respondent was ordered to write summonses which he did observe. Cutter said that Respondent told another member of SIU, in March, 2010, about two Criminal Court (C) summonses that he issued in April, 2009, for disorderly conduct and for no dog license. Department's Exhibit (DX) 1 is C-Summons No. 431847973-0, issued on April 24, 2009 and DX 2 is C-Summons No. 431847975-4, also issued on April 24, 2009.

During his official Department interview, Respondent admitted to issuing these summonses, even though he did not observe the violations, because he was ordered to do so by McHugh. Cutter testified that before Respondent admitted to issuing the summonses, Respondent was treated as the complainant, but after Respondent's admission, Respondent was treated as the subject. Cutter reviewed the affidavit portion of the summonses and learned that Respondent signed it.⁴

Cutter learned that Respondent's partner, [REDACTED] worked with Respondent on the date the summonses were issued. Cutter conducted an official Department interview with [REDACTED], but [REDACTED] did not recall any specific information about the summonses. Cutter concluded that he did not have enough evidence to substantiate Respondent's allegations against McHugh.

During Cutter's official Department interview with Respondent, Respondent told Cutter that Respondent did not notify IAB about issuing these summonses because he was afraid of retaliation from McHugh. Cutter said the first time Respondent mentioned the April, 2009, summonses, was in March, 2010.

⁴ After the close of trial, on March 21, 2013, at my request and on consent of the parties the audio recording and transcript of Respondent's official Department interview conducted on April 21, 2011 was received in evidence as Court Exhibits 1 and 2.

During cross-examination, Cutter said Respondent also made anonymous complaints to IAB in November 2009, but the logs for these anonymous complaints were investigated by Bronx Investigations. Cutter did not interview Bronx Investigations but did confer with them about Respondent's complaint. Cutter agreed that Respondent gave Cutter a copy of a letter that Respondent gave to IAB. The letter listed the allegations of misconduct that were made by Respondent. Respondent's Exhibit (RX) A is a copy of the letter written by Respondent to IAB.

Cutter reviewed the case folder and the closing report that Bronx Investigations provided with regard to Respondent's initial complaint. He said Bronx Investigations concluded that Respondent's allegations were unsubstantiated. After having reviewed the closing report, Cutter said there were multiple investigations that were conducted by Bronx Investigations and that the allegation that QUAD investigated about the misclassification of complaint reports was unsubstantiated.

Cutter agreed that in connection with Respondent's complaint against McHugh and Valenzano, he reviewed tape recordings that Respondent had provided to SIU and that he had spoken to Respondent about them.

Cutter testified that he did not interview McHugh, but McHugh's official Department interview was conducted by Inspector Grossi, Commanding Officer of SIU. Cutter was given an audio recording of the interview and then transcribed it on his worksheet, but did not recall if McHugh made statements regarding "20 and 1" on Respondent's Monthly Activity Report. Cutter did not recall if McHugh was questioned about his statements during the interview. Cutter agreed that it was McHugh's voice on

the tapes that Respondent discussed with him. Cutter stated that during his investigation, he was assigned a team leader who reviewed his work.

Cutter conducted random interviews with about eight to ten police officers, some from Respondent's platoon and some from other platoons.

Cutter said Grossi recommended that Charges and Specifications be prepared against Respondent. Cutter did not make recommendations in this case. At the time of the investigation, Cutter was in the rank of sergeant.

Cutter agreed that Respondent had alleged a monthly goal or quota of 20 summonses and 1 arrest while other police officers "discussed certain numbers but there were other police officers who did not lock in or state a specific number."

After reviewing investigative reports Cutter recalled that he interviewed Police Officer Joel Boyce on October 4, 2010, and that Boyce said that 20 summonses and one arrest was expected per month in the 41 Precinct. Further, Police Officers Stephanie Fidanza and Rugoberto Lincona, in their official Department interview, also stated that 20 summonses and one arrest was their monthly goal or "expectation."

Cutter testified that during their official Department interview, McHugh and Valenzano explained that there were certain conditions in the 41 Precinct that "needed to be met or responded to by officers who were on patrol, and one of the ways that you can show that you are addressing existing crime conditions within your precinct is through enforcement activity, such as arrests or summonses."

Cutter recalled that Sergeant Bennett, in a tape provided by Respondent, mentioned a specific number but did not know if it was 20 summonses and one arrest. Cutter also recalled that Bennett said, in sum and substance, something to the effect of "if

you didn't [reach the goal/quota] you would become a pizza man." Cutter did not recall Bennett's tone of voice when he made the comment and did not consider this comment to be a threat.

Cutter agreed that McHugh was a "hands-on" commanding officer who would go out on patrol with other police officers. Cutter also agreed that based on what Respondent had told him, McHugh was present when Respondent issued the two summonses. Cutter was not present for McHugh's official Department interview but he did review it. Cutter did not know if McHugh was asked what the difference was between productivity goal/performance standards and quotas.

Cutter said,

I had no experience in this investigation where I observed any summons where [one officer says he observed another officer witness the violation and signs off on the summons] was written on the back of the summons.

Cutter agreed that Respondent also alleged the reclassification of criminal statistics, but that QAD had unsubstantiated it. Cutter stated that McHugh told Respondent to come to McHugh's location, a checkpoint, where McHugh allegedly ordered Respondent to issue the two summonses. From McHugh's official Department interview, conducted by Grossi, Cutter learned that McHugh said that he is very active in the field and often calls police officers to respond to his (McHugh's) location "on multiple occasions to make arrests, to stop people, to address the quality of life and crime conditions that are existing in that command."

He said, "In the Patrol Guide it does state that you're not supposed to be informed by or write on the rear of the summons that you haven't been informed by a violation having transpired, and then sign your name to it." Cutter explained that if a police officer

is asked to do this, the officer should "advise whoever is saying that that it goes against or violates the protocol in the Patrol Guide."

Cutter agreed that the worksheet for McHugh's delineated that McHugh "[h] as officers respond to his location and at times he will complete the front and rear, or he will have people, yes, cross out 'I personally observed.' Yes, that is stated in that bullet point."

He further agreed that this violated the Patrol Guide. Cutter testified that McHugh's statement was pointed out to Grossi, but Charges and Specifications were not preferred against McHugh.

During re-direct examination, Cutter said he did not revisit or re-analyze the steps taken by other investigative bodies regarding Respondent's allegations.⁵

Captain Andrew Valenzano

Valenzano has been with the Department for fourteen and a half years. He has been a captain for about 15 months. He is currently in Manhattan North Narcotics, before that he was Executive Officer of the 25 Precinct, before that he was a lieutenant in Manhattan North Narcotics and before that a lieutenant in the 41 Precinct. He was promoted to lieutenant in June 2008 and arrived at the 41 Precinct in July and remained for about two years. In September 2010, he was the 3rd Platoon Commander. He agreed that on December 12, 2009 in the vicinity of Alders Street and Whitlock Avenue he was involved in an incident with Respondent.

⁵ During Cutter's testimony the following exhibits were introduced into evidence: Respondent's Exhibit (RX) A1 is a revised copy of Respondent's letter, RX A is the original letter, RX B is IAB Report No. 103, RX C is IAB Report No. 104, and RX D is IAB Report No. 106.

He explained that they were present at the location to conduct a vehicle check point. During the course of that checkpoint Officer [REDACTED] became ill and they called for an ambulance. When he heard the radio call he exited his vehicle and walked over to investigate. He saw that Police Officer [REDACTED] had a pale face. Since he was not bleeding out, Valenzano felt that they could wait for an ambulance to arrive rather than running him over to the hospital. He decided to have a sector car follow the ambulance to the hospital.

Valenzano did not see it occur but at some point he knew that Respondent was in the ambulance with Officer [REDACTED]. He told responding Officers Almonte and Restrepo that one of them was to go with [REDACTED] in the ambulance to secure his gun, shield, duty belt, vest and other personal effects. The other was going to follow the ambulance with the RMP to expedite the ambulance's ability to get to the hospital.

At that time he noted that other units had responded to the area such as ESU whose officers have advanced life saving training. He then made his way to the ambulance.

When he got to the ambulance he peered in. There were several people around, a "couple" of ESU officers. He said he also believed that Sergeant Rodriguez was next to him. He said Respondent was "kind of by like the entrance of the door of the ambulance."

Valenzano said he instructed Respondent several times that he had officers going to the hospital and that he needed to come out of the ambulance. He said he assigned two officers that he wanted to use to go to the hospital and it made sense, he said, to have one accompany Officer [REDACTED] and another drive the vehicle there.

He said it appeared that Respondent was ignoring his instruction. He said he then told Respondent that he had to get out of the ambulance. Respondent repeatedly said that he did not have the authority to do that. Valenzano stated that Respondent said that he was going with his partner and basically stated, “[D]o whatever the fuck you got to do.” Valenzano said he took that to mean that Respondent was disobeying his order.

In response Valenzano said he gave increasingly firm orders for Respondent to get out of the ambulance. He was again told he did not have the authority to do that and he was taken aback by this response. Valenzano said he then asked Respondent for his gun and shield. Respondent again told Valenzano that he did not have the authority to do that and pushed him on his chest. Valenzano said that he really did not see that coming.

After being pushed by Respondent, Valenzano said he staggered back and took a combative stance. He said he was grabbed by an ESU officer and he believed by Sergeant Rodriguez who pulled him back saying it was not worth it.

He recalled hearing Respondent tell him that he was a “white mother fucker” and a “white bitch.” He believed that Respondent was being combative and disrespectful. He also ordered Respondent back to the stationhouse.

Respondent refused to hand over his gun and shield which Valenzano said he asked for because he was going to suspend Respondent. Respondent was in fact suspended later that day.

Valenzano was aware that Respondent and Officer [REDACTED] usually worked together. When asked why he did not allow Respondent to accompany Officer [REDACTED] to the hospital Valenzano replied,

It's been my experience and my practice that – uh – I've seen when individuals have an emotional attachment to a situation they may not be

the best person for that particular assignment. I would equate that to a situation where a doctor would be conducting surgery, he would not be conducting surgery against his own family his wife, his spouse, his child. It's just not appropriate in that regard.

With regard to how he obtained Respondent's firearm, Valenzano said that asked Sergeant Rodriguez to get it but he was unable to do so as well. He said he noticed that Respondent was not being rational in his "decisions and in his actions" so he had ESU attempt to acquire his firearm and shield from him, which they successfully did.

On cross-examination Valenzano agreed that he had heard that Officer [REDACTED] had chest pains and that he had stated that he was not "bleeding out." He has had basic Cardiopulmonary resuscitation (CPR) training through the Department. Valenzano said Officer [REDACTED] was speaking but did not appear quite right. He was a bit pale.

Describing the situation when he got to the scene, Valenzano said that he could not recall seeing Respondent but that Officer [REDACTED] was near the curb on the side of [REDACTED]. The ambulance was not on the scene yet. He did not stay with Officer Rodriguez but made sure there was free movement of traffic so that the ambulance could get in and out. He agreed that he did not stay with Officer [REDACTED] while awaiting the ambulance.

He said that the first sector car to respond was staffed by Police Officers Santos and Andihar but their siren was malfunctioning. It was his intention to have the first sector car that responded to escort the ambulance but the siren problem precluded him from doing that. Moments after Restrepo and Almonte arrived. He could not recall if the ambulance was on the scene at that moment because everything happened in a short period of time. He could not recall exactly where he was when the ambulance arrived.

Nor could he say how far away Respondent or Officer [REDACTED] was at that moment.

He did not see Officer [REDACTED] or Respondent enter the ambulance.

He said he gave his instructions to Almonte and Restrepo as soon as they arrived. He did not recall Almonte telling him that Respondent was in the ambulance but acknowledged that he would have instructed Almonte to tell Respondent that he was not going and Almonte was. Valenzano described the scene as "fluid" and said he could not say exactly where he was at that moment. After a short period of time he walked over to the ambulance and at that time Respondent was "partially" in the ambulance. He got to within two and a half to three feet of Respondent at which point he said he asked Respondent to exit the ambulance.

He believed that some ESU officers and Sergeant Rodriguez were in the vicinity at that time. Valenzano agreed that he told Respondent to step out of the ambulance probably using the term "bus" for ambulance. Valenzano did not know if Almonte had told Respondent that he had directed him to step out of the ambulance but he did recall telling Almonte that he was going to the hospital. He said he gave his instructions at the side of the ambulance. During their "banter" which lasted 20 to 25 seconds, Respondent said he was not going to leave the ambulance.

Valenzano denied that Respondent had exited the ambulance before their argument started. Valenzano denied grabbing Respondent "in a violent manner twisting him round and telling him he's not going." He indicated that he never touched Respondent. He denied hearing Respondent say "get your fucking hands off me."

Valenzano said that Respondent pushed him as Respondent exited the ambulance. At that time Sergeant Rodriguez was next to him.

Valenzano testified that he was aware that there was a recording made of the incident and that he had heard it. He agreed that on the recording he did not hear Respondent call him a "white bitch." He noted that the tape was garbled but agreed that he can heard on two occasions asking Respondent to turn over his gun and shield. He indicated that at no point did he touch Respondent. Valenzano indicted that he asked Respondent to exit the ambulance several times, further stating that it was a minimum of three times. He said that Respondent never asked if he could go with his partner nor did he ask why he could not go.

Describing the scene, Valenzano testified:

Well, after he pushed me, he definitely took a combative stance and was in the process of raising his arms, this happened in a matter of seconds. As I stated before, there were people around us that separated us within seconds.

When asked if he took a combative stance immediately after he was pushed by Respondent, Valenzano said:

I stumbled back first, and then I was about to obviously had been pushed, so I was in the process of probably taking a combative stance. I was very surprised and very taken aback by this.

Valenzano said that before Respondent pushed him he said something like, "white mother-fucker, you white bitch." After reviewing the transcript of his official Department interview, Valenzano agreed that he did not mention the "white bitch" comment and stated that if Respondent did not say it before he pushed him then he later said it. Valenzano agreed that the incident in which he asked Respondent to leave the ambulance took about 20 seconds.

Valenzano said that he told Sergeant Rodriguez to remove Respondent's firearms a "couple of minutes" later and that he said he had so taken aback by Respondent actions

that he needed a few minutes to collect himself. By that point he and Respondent had been separated and taken away in opposite directions. They were some distance apart from each other.

Valenzano said that after Sergeant Rodriguez told him that Respondent was not giving in his firearm, he spoke to ESU and told them to get the firearm and treat him like an EDP. He said that Respondent was armed and not acting rationally. He acknowledged that Respondent never threatened him with the firearm. Valenzano denied pushing Respondent.

At some point in time, Respondent was in an RMP and Valenzano was aware that ESU had taken his firearm. He denied going over to the vehicle and he denied harassing Respondent.

Valenzano stated the reason he did not let Respondent go with his partner to the hospital was because he had already assigned a sector car to there and because Respondent had an emotional attachment to the situation. He said that the individual who accompanies someone to the hospital need to be able to make hard, fast, quick decisions and for a person who is emotionally attached that is difficult to do.

Valenzano denied that when Respondent said he did not have the authority to do that Respondent was referring to Valenzano touching him. He denied that the whole incident resulted from the fact that he had grabbed Respondent and turned him around.

On further cross-examination Valenzano agreed the term "20 and 1" referred to "a productivity amount desired of all police officers working at the time." When asked how this would be communicated Valenzano stated:

Well, I would state that in a broad range, at roll calls I would discuss crime conditions and traffic situations that were going on in the

command and areas that we had violent crime, robberies and those areas that I'd like to send my police officers out to target within the scope of their employment, and were the conditions of their employment when they took the test to become a police officer, was that summonses would have to be issued. Yes, we do have discretion but it is a crime fighting tool that was used for a long period of time now at our police department in terms of attacking our violent crime patterns.

Valenzano did not know why it was 20 summonses and 1 arrest as opposed to 15 summonses and 1 arrest or 10 summonses and 1 arrest. He never saw anyone disciplined for not making 20 summonses and 1 arrest. When asked what was done to assist officers to meet that goal, he said:

Well, it was direct working with a supervisor to insure that violations that were appearing that I observed when I was operating out on the streets of the South Bronx were also subsequently enforced by officers who may not have the internal drive as the next person or the commitment to their community.

He did not recall going out on enforcement with Respondent but he was sure it was done. He said Respondent's performance was substandard. He did not recall specifically sitting down with Respondent and discussing that issue. He denied taking productivity into consideration in granting days off. He denied that anyone got undesirable tours due to productivity.

Valenzano denied that Respondent had been assigned to the checkpoint on December 12, 2009 to see if he could issue summonses and reach his goal, stating that there were other reasons. He explained that the area of Alders Street and Whitlock Avenue feeds into Hunts Point and it is one of the highest vehicle accident prone locations in the precinct and an appropriate location for a safety checkpoint.

Valenzano did not recall having a conversation with Police Officer Licona⁶ in which he told him that he had to get his productively level up before he would grant him time off.

The Respondent's Case

Respondent called Police Officer Joel Boyce, Police Officer Stephanie Fidanza, Police Officer Rigoberto Licona, Police Officer ██████████, Police Officer Rudolpho Almonte, Deputy Inspector Donald J. McHugh and Sergeant Horacio Ortega as witnesses. Respondent also testified on his own behalf.

Police Officer Joel Boyce

Boyce is assigned to the 41 Precinct. He recalled speaking with Sergeant Carter in October 2010 about what were the expectations for writing summonses and arrests in the precinct. He explained that "The expectations would be considered toward activity goals of 20 and I, which 20 would be multitude of summonses, parkers, movers, C summonses and at least one arrest per month."

Boyce said he became aware of this during roll call by various supervisors including Valenzano. He said officers who failed to meet that goal for a month or two in a row could be denied days off, threatened with a change of tour or an undesirable foot post. He did not recall hearing the Patrolmen's Benevolent Association (PBA) union delegate speak at roll call. Boyce said that he was told by the PBA delegate that it would

⁶ The Respondent's attorney referred to police Officer Licona as being female but Licona is a male police officer.

be in their best interest to meet the goals so that if they (union delegates) had to see the captain about a problem they would be in a better position to defend the police officers.

Boyce described McHugh, who was his captain in 2009, as being "hands-on" and in the street initiating activity if he saw someone drinking or engaged in other summonsable crime. He agreed that during that time period he had been called to locations to write summonses. Boyce said a supervisor might call him to the scene where they had witnessed something and told him to write a summons and write in the body that he was informed by whoever the supervisor on the scene at the time was. He said this happened to him at least five times. He did not recall officers who did not make their productivity goals being discussed at roll call.

On cross-examination Boyce said that he was not "really" told to issue a summons that he had not witnessed and write it up as though he had witnessed it. He stated that, as he had explained, he was asked to write in the body of the story "informed by."

Police Officer Stephanie Fidanza

Fidanza is assigned to the 41 Precinct. From 2009 through 2010, she recalled that there was an expectation that officers issue 20 summonses a month. She was told about this at roll call by Valenzano. She recalled a PBA delegate speaking at roll call and saying to make sure that they had their activity, meaning summonses and arrests. She said they also had to make one arrest a month. She said failure to do that could lead to an undesirable post but she was not aware of any specific instance where that happened. It did not happen to her.

She did recall one incident in which she asked for lost time and was told to go back into the field and get summonses. On cross-examination she said she was sent out by Valenzano and was able to issue summonses.

Police Officer Rigoberto Licona

Licona is assigned to the 41 Precinct. From 2009 through 2010, his supervisor was Valenzano. He said the expectation was that he would issue 20 summonses each month and make one arrest. He did not recall who said it. He said the PBA delegate spoke at roll call and said to bring in what was expected so "they" would leave you alone. He said failure could result in an unpleasant assignment like guarding a hospitalized prisoner. He said he was good with his activity and did not recall whether he was denied time off.

Police Officer [REDACTED]

On December 12, 2009, [REDACTED], who is a police officer in the 41 Precinct, was assigned to a checkpoint when he had chest pains and couldn't breathe. He told his partner, Respondent, who called the sergeant who sent for an ambulance. When the ambulance arrived, Respondent walked him to the ambulance. He got in and was being treated by EMS. He also spoke with Valenzano and told him about his condition. Officer [REDACTED] stated that another officer came into the ambulance and advised Respondent that he would not be accompanying Officer [REDACTED] to the hospital.

Officer [REDACTED] then testified that Respondent left the ambulance because Valenzano told him that he was not accompanying Officer [REDACTED] to the hospital.

Officer [REDACTED] said that before Valenzano said that, Almonte had already entered the ambulance. He said Almonte told Respondent he was not going to the hospital.

Respondent walked out of the ambulance. Officer [REDACTED] said there was no interaction between Respondent and Valenzano at that time. He did not hear anyone say "white bitch" nor did he hear Respondent refuse to obey Valenzano's order when he exited the ambulance. He did not hear any kind of argument.

Officer [REDACTED] said that after Respondent left the ambulance they injected him with something and he woke up in the hospital.

Police Officer Rudolpho Almonte

Almonte has been a police officer for seven and a half years. He is presently assigned to the 41 Precinct which is the same place he was assigned to on December 12, 2009. On that date he and his partner, Police Officer Restrepo were called to a scene at [REDACTED]. When he arrived, he saw several police officers and an RMP. Officer [REDACTED], who was complaining of chest pains, was sitting in an RMP.

As soon as Almonte got out of the car, Valenzano approached him and told him that he and his partner were going to go to the hospital with [REDACTED]. He said his partner "would be taking care of the gun belt." He said this occurred "way before the ambulance got there."

When the ambulance arrived Respondent, who had been in a police car with Officer Rodriguez, walked him to the ambulance. Almonte said that he walked to the ambulance but Respondent was already seated there and Officer [REDACTED] was lying

down in a stretcher so he walked back to his car. He did not recall having any conversation with Respondent at that time.

As he was going back to his car, Valenzano asked him where he was going. He told Valenzano that Respondent was already in the ambulance and that he would go with Officer [REDACTED] to the hospital. Respondent was seated, he said, near the side door of the ambulance.

Valenzano told him that he (Almonte) was going to the hospital with Officer [REDACTED]. Almonte said that he told Valenzano that Respondent was going to go with his partner but Valenzano said that he wanted him (Almonte) to accompany Officer [REDACTED].

Almonte said he walked back to the ambulance and told Respondent who protested that Officer [REDACTED] was his partner. Respondent did step out of the ambulance and walk away. Almonte said that because so many people were on the scene he worked his way to the back of the ambulance.

Almonte did not recall Respondent saying anything to Valenzano or Valenzano saying anything to Respondent at that time.

Inspector Donald J. McHugh

McHugh is an Inspector currently serving as Commanding Officer of the World Trade Center Command. He knows Respondent who served under him at the 41 Precinct. He did not recall preparing the Charges and Specifications against Respondent noting that that is usually done by someone in the Department Advocate's Office. He agreed that he did sign off on the Charges and Specifications. He said there is noting in

the charges that he agreed with or disagreed with, he noted that he simply signed off adding that he never attested to anything in the charges.

McHugh was transferred to the 41 Precinct in, he believed, January 2008 in the rank of captain. He left in approximately October 2010. He said he signed off every month on each officer's monthly activity sheet as prepared by their sergeants. He explained that there was generally a list of the officer's names, the complaint reports they took, accident reports, summons reports, "anything they did during the month."

McHugh agreed that he worked with Respondent prior to that at the 46 Precinct where Respondent did his original training. He said he never had a problem with Respondent at the 46 Precinct.

The only incident McHugh recalled about Respondent was when he suffered chest pains and was taken to the hospital. McHugh stated, "Other than that he didn't draw any attention to himself. He did a good job."

He said that he set goals on productivity in an attempt to monitor what officers do. He noted that their productivity was directed toward the quality of life and criminal reports they had in the precinct.

McHugh agreed that he had bi-weekly meetings and productivity was one of the issues that was addressed. He agreed that he had set productivity goals of twenty summonses a month for the officers. He agreed that at some point in time, he called Respondent into his office because he believed Respondent seemed to be capable of doing a better job. He did not recall specifically ordering Respondent to do "team enforcement" at a checkpoint but agreed that his lieutenants had that authority.

McHugh said he may have been working on April 24, 2009 but that he did not recall. He said that he did not carry a summons book. He stated that he would call officers to the scene if he observed something and have them issue the summons.

When asked to describe team enforcement McHugh stated:

Team enforcement is we have what I like to call hot spots, so throughout the precinct, we have chronic crime conditions with everything from shootings, drug dealing, prostitution, gangs, you name it, as well as accident-prone locations and areas that are concerns for the community. I would direct my officers to go there with the sergeant and/or lieutenant to make sure that we issued summonses and had activity in these areas.

McHugh said that he was not aware that Respondent had been assigned to a holiday post on December 12, 2009. He could not recall if the Borough Chief ordered Respondent to a holiday post or if the Borough Chief ordered McHugh to create holiday posts. McHugh explained that such posts were for the shopping districts of the Precinct.

With regard to team enforcement, McHugh said it was more than just issuing summonses or making arrest it is, he said, to make the area "hot for the bad guys." He also agreed that it generated activity. He did not know how often Respondent had been given this type of enforcement duty but he knew officers were selected who "weren't taking care of conditions on their own."

McHugh said that he did not recall Respondent issuing a summons at his direction but acknowledged that he may have called Respondent to the scene, as he does with other officers, to issue summonses. He did not recall doing team led enforcement at any time and any location with Respondent. "Individually? Yes. Team led, like where I was doing a checkpoint or something myself? No."

When asked about his statement that he did not carry a summons book or issue summonses himself, McHugh said:

No. I issue summonses. I misspoke there. I will issue summonses, assign summonses, fill out the back of the summonses, depending whether the officer observed it when he got there or didn't. It would depend on the circumstances, but I would need them to furnish me with a summons, that's correct.

He went on to explain:

There are three scenarios that occurred with me. Number one, the officer would cross out I did not observe and initial it and sign, and then at court, I come down and testify as to I was the observing, apprehending officer. He's the arresting officer. The second thing is they would write the details, see me later on and have me sign it as the complainant, as they continue their patrol, or they give me the summonses themselves, can you fill this out, boss, I didn't see it and I would fill out the summons.

McHugh said that he does not carry an Activity Log so he said that he is dependent on the officers. He recalled that there was an anonymous letter that had been attributed to Respondent. He said that November was the time frame that Respondent reported the matter to IAB. That would have the time he became aware of a rumor that there was a letter which was going around the Command that was negative towards him. He said he was never made aware of a complaint made by Respondent to IAB.

McHugh agreed that checkpoint assignments are given to officers like Respondent with low productivity levels. He denied assigning Respondent to do things like issue the summonses at issue to increase productivity. He said:

The community complains vehemently every month about unleashed dogs, pit bulls and dogs taking - - going to the bathroom and the kids can't play. When I drive around on my own, I go to those areas to see if the officers are taking care of the conditions that people are complaining about. Since I don't carry the tickets, all the time I would

call people over to the scene if I observed something, including I would call them over to place handcuffs and assist me in arresting people, and I would testify when accordingly necessary all the time, for years.

With regard to the dog ticket matter, McHugh stated:

I remember the dog case incident. I know I was asked about that during the federal deposition that I gave and my answer to that was I have no specific recollection of it, but they inquired to me about it, that's why I was assuming, Counselor, this was the dog ticket you were talking about in '09.

When asked if he had a specific recollection the incident, McHugh testified:

...it's absolutely possible I called [Respondent] and his partner and other officers to the scene. I do it routinely.

McHugh agreed that he reviewed the summonses after they were issued or back at the Command but he denied ever seeing the two summonses in this case (DX 1 and 2) before, stating "I never reviewed them but I don't recall reviewing them and I never saw them."

McHugh agreed that "for the most part" he reviewed the summonses he has asked officers to sign or to cross out. He denied that this was to avoid the need for him to go to court, stating the he goes to court all the time. McHugh said he has never ordered an officer to cross something out and say they observed something they did not observe.

He agreed that sometimes officers would cross out the part about personal observation and put in information and belief. He said he has never been informed by the District Attorney's office or anyone that such summonses were dismissed having cross outs.

When asked if Respondent was an active officer at that point in time, McHugh answered:

I don't – you know, I think I look at people as what is their total capability. [Respondent] was a sharp guy. He was a computer guy. We had him he got modified. I don't know – he was inside doing the computers. I just thought he had the capability of being a top performer, a top star on the job, so when he wasn't doing something every day, anyone would draw my attention as if to say, hey, you're not helping us make a difference.

When asked what he meant by that, McHugh went on:

It means that I have conditions that I have to address. There are negative secondary effects with drug dealing, with the gangs that I have. I was a PCP capital of North America. I led the City in 9-1-1 complaints, in narcotics and radio runs. I had more gangs than you can shake a stick at. I had the two biggest terminal markets in the Bronx, and prostitution on a daily basis with girls standing on a corner and I needed my officers to engage in those conditions, and part of what we do is issue summonses with respect to that.

Respondent⁷

Respondent is a police officer who was appointed on July 11, 2005. After his six months at the Police Academy, he was assigned to the 46 Precinct where he served for six months before going to his current assignment at the 41 Precinct. When he arrived at the 46 Precinct, the Commanding Officer (CO) was Captain Macenderi. Later he was replaced by Captain Ortiz. Neither of these captains required a particular amount of summonses or arrests per month. McHugh replaced Ortiz as CO of the 41 Precinct. After that he was informed that there was a goal or quota regarding summonses and arrests. This was conveyed by Valenzano and the sergeants.

⁷ Respondent's testimony was broken up to facilitate the calling of other witnesses. His testimony is found starting on pages 409, 474, and 523 of the transcript.

Respondent said that McHugh would come to roll call and advise officers of this as well as Valenzano, Sergeants Rodriguez and Bennet and PBA delegates Horan, Pondaro and Scupiz.

When McHugh arrived at the precinct, Respondent said he was assigned to patrol duties. In March 2008, he was placed on modified assignment as a result of a domestic incident. Eight months later when he was authorized to be reinstated to full duty status, McHugh gave him a letter to bring to Employee Management Division to request that he be kept in the 41 Precinct. He resumed patrol in approximately December 2008. The incident he had been modified for was deemed unfounded.

Respondent explained that when he was restored to full duty, he was kept at the assignment he had had while modified which was crime analysis because there was no one else to do it at the time. He said that he alternated between crime analysis and patrol duties.

Respondent stated the goal was to issue twenty summonses and to make one arrest per month.

Respondent said that Officer [REDACTED] was his partner, McHugh was the CO and Valenzano was the Platoon Commander. He said the only disciplinary action taken against him was a Command Discipline (CD) in 2008 for appearing in court without his bullet resistant vest.

Respondent said that he did not meet the productivity goals all the time. When he did not, "they would throw me in checkpoints. I would be going to a scene where I would have to drive a supervisor and the supervisor would point out whatever he sees for us to create activity."

He said this was done because he was not getting the activity on his own. He testified:

The supervisor used to get pissed off and they used to drive us around and get it for us basically or call us to a scene where they observe something and tell us to write summonses.

Respondent said they would have them write summonses for whatever they observed. He recalled two instances where "they" had him write a summons for no dog license and Disorderly Conduct. He said that the CO, McHugh along with the Executive Officer (XO), Cartwright had him and his partner [REDACTED] issue the summonses. He testified:

Basically, we were doing our patrol duties and we heard over the air the Captain asking for a unit to 85 a non-emergency, that they had several people stopped at a certain location, so when we go to that location, he would direct me to write this person up a summons for Discon, write this person a summons for no dog license.

When asked if he observed the violations himself, Respondent answered, "No, obviously I wasn't there." When asked if he was told that he was to be the person observing the events or if he was to use some other language which would indicate that he did not observe the event Respondent answered: "At that time, no."

Respondent stated that he wrote the summonses indicating that he made the observation. Respondent testified that, "He just asked me to write the summonses. He didn't give me anymore specifics."

When asked why he had written the summons as though he had observed the events, Respondent stated that about a week earlier, Valenzano had told him that he was

not meeting his numbers. When asked what he believed that meant, Respondent continued:

That I have not met my quota for the month, my twenty and one, for which we have to go out there and get activity, so he told me whenever me, myself, or the Captain or the XO call you to a scene, do not put informed by in the summons because that's not gonna stick. He said: You know, most of the time, people don't go to court, they just pay them, they don't fight them, and we don't have the time to go to court; neither myself or the Commanding Officer or the XO have time to go to Court.

Respondent said he believed he had reported this matter in a letter he had sent to IAB. He said he first reported the matter by leaving an anonymous note with his Integrity Control Officer (ICO). He said he left it under the ICO's door and he thought that would have triggered an investigation. About two days later he called IAB and made a complaint there. He said the complaints were made in September or October.

He said he did not make the complaints sooner because he was afraid of retaliation or being considered a rat. He never appeared in court regarding the two summonses and he did not know what happened to them but he believed that a sergeant from IAB had told him that they had been dismissed.

Respondent acknowledged that on the summonses he issued (DX 1 & 2) he signed that they were based on his own observations.

On December 12, 2009 Respondent was working from 1500 hours to 2323 hours. He was assigned to a checkpoint in the vicinity of [REDACTED] [REDACTED]. He was there with his partner Officer [REDACTED], Sergeant Rodriguez and Officers Aquino and Torres. They had been assigned to the checkpoint by Sergeant Rodriguez and had been told to get ten summonses for Valenzano. He said his

specific position would vary, sometime he was the spotter who would send motorists to someone else who would write up the summonses sometimes they would reverse positions.

About twenty minutes into their work, he noticed that his partner, Officer [REDACTED], was pale. His partner called him over and said that he had very bad chest pains. He helped his partner take his jacket off and they called over Sergeant Rodriguez who was the supervisor on scene. The sergeant ordered Respondent to secure Officer [REDACTED] gear and place him in an RMP, which he did.

Valenzano also came by and asked Officer [REDACTED] what he had eaten that day. Respondent at this point noted that he had been partners with Officer [REDACTED] for almost five years.

An ambulance arrived and one of the EMT's came over and asked Officer [REDACTED] if he could walk. He answered in the affirmative so Respondent and Aquino walked Officer [REDACTED] to the ambulance. Respondent said he went into the ambulance and sat Officer [REDACTED] down.

Respondent said he was standing next to Officer [REDACTED] when the EMT's put him in a stretcher and started to check his vital signs. Respondent said at that time he turned his recording device on. Respondent stated that he had a small electronic digital recorder which he had in his pocket. He said he eventually turned that over to IAB, which he said occurred in December 2009.

Respondent said he never got his digital recording back but that he had made a copy on his computer. He said that he did not tamper with the recording and he said it was a fair and accurate recording of the events that occurred from when he entered the

ambulance to when he left the area in an RMP. The recording, which is on a CD, was received in evidence without objection (RX G).⁸

Respondent testified that when he entered the ambulance, he sat next to his partner who was placed on a stretcher when he noticed Almonte peek in from the side door. When asked what happened after that, Respondent stated:

He didn't say anything. He just went back out, so I keep, you know, worrying about my partner. I asked him if he needed me to call his family or anything like that. Then Officer Almonte come back in about a minute after that, and when Officer Almonte come back in, he's telling me: Polanco, the Lieutenant told me that I'm going with your partner, not you. I also overhear the Lieutenant's voice from outside saying Polanco, I got the sector going.

Respondent said he immediately got out of the ambulance and said "Okay." Respondent denied refusing to get out of the ambulance. Respondent testified:

As I exited the ambulance outside, Lieutenant Valenzano was standing about three feet from the rear entrance, and I approached him and I asked him: Lieutenant, is there a reason why I cannot go with my partner?

Respondent denied pushing Valenzano. He stated that Valenzano's answer was that he had the sector going. Respondent said he was about three or four feet from the rear entrance of the ambulance when this occurred. Valenzano, he said, was right in front of him. He said Valenzano did not ask him for his gun and shield at that point in time, stating that there was no reason for such an order.

Respondent denied refusing to exit the ambulance at any point in time. He was asked if he told Valenzano that he was going with his partner as Valenzano had claimed and Respondent stated that that was another lie.

⁸ The recording was not played at this time because the parties were instructed to review the transcript for accuracy.

Respondent he asked Valenzano if there was a reason why he could not go with his partner and Valenzano replied that he had a sector going. Respondent said that he went to the back of the ambulance where his RMP was and made a phone call to his partner's family to let them know the situation. He said he got no answer and left a message.

He said that after he finished the phone call perhaps a minute or two later he went back to the ambulance to Almonte who was outside. He said he looked into the ambulance and saw that his partner's color had gotten worse and that he had an oxygen mask on. Respondent stated:

It was at that time and then that I got worried about the condition of my partner. I thought he was gonna die. At that point I approach the lieutenant who was about ten to twelve feet to the right to the rear of the ambulance.

I went to the Lieutenant, and at that point, because I was worried about my partner and because six months prior to that I lost my father and I wasn't there for my father when he died, I told Lieutenant Valenzano at that point: You can do as you please. I'm going with my partner.

Respondent stated that his tone of voice when he said this was "low", it was not high and he was not screaming. He did not recall anyone being near Valenzano when he said this. Valenzano's response, he said, was to say "What?" Respondent interpreted this to mean that he did not believe what he was saying. Respondent then said that he turned around again and told Valenzano, "Lieutenant, I say you can do as you please. I'm going with my partner." At that point Respondent said he tried to walk toward the ambulance. "I tried to go left." He said that he was six to eight feet from the rear entrance to the ambulance at this point. He testified that at this point he felt a hand "grab

me through the back." He said Valenzano then told him to report back to the station house immediately. Respondent testified:

As I didn't know whose hands it was, when he turned, then I feel the other hand come around my chest, and when I turn around, it was Lieutenant Valenzano. At that time he gave me an order to surrender my gun and shield right now.

Respondent testified regarding what happened at that point in time:

It was instantaneous, out of reaction, I immediately push his hands off my chest. It was something very quick...I told Lieutenant Valenzano: you don't have the authority to do that. And what I meant by that is he didn't have the authority to put his hands on me.

Explaining why he did not hand over his gun at that point as ordered Respondent stated:

He had his hands on me. There was no time by the time he told me, he's already grabbing me. He has his hands on me ... I push him straight at, I believe, his chest, just to break his grip. His grip was very hard. I could feel the pinch between the vest and my skin, and he was so close I could actually smell his breath. He was very close to my face...I became very upset. I said: You don't have the authority to do that...What the fuck is your problem? What the fuck is your problem, mother fucker? What's your problem? Why you fucking touching me? Why you fucking touching me?

Respondent denied ever calling Valenzano a "white bitch" at that point in time.

He was then asked if he stated that in a low or high voice and Respondent stated: "I was upset. I was hitting a high voice." When asked what happened next, Respondent said:

The second I push him and I said that then a bunch of officers came around me. Some of them were holding my arms. I remember Sergeant Rodriguez putting his hands around my waist...

Respondent said that the order to turn over his gun was never given. He said that Sergeant Rodriguez told him to keep his eye on the ball and not to get jammed up "for this fuck."

Respondent indicated that his statement that Valenzano did not have the authority to do that was taken out of context and that is was about Valenzano putting his hands on him.

Respondent acknowledged that he pushed Valenzano with both hands on his chest but said that this was in response to Valenzano's physical contact with him. He agreed during direct examination that the push was not in response to the order to turn over his gun.

He said Sergeant Rodriguez had his hands around his waist and that he keeps his gun on his waist. He denied lunging at Valenzano while other officers were holding him.

Respondent said that while the other officers were holding him, Valenzano told him to report back to the station house and turn over his gun and shield. Respondent said he did not comply with that order. He stated:

I didn't think it would be safe for me, after having an argument with the Lieutenant, after him touching me, for me to withdraw my gun. That could be fatal. It could have been misinterpreted by other officers.

He said he was held there for a minute or two during which time he stopped yelling at Valenzano.

After that Respondent said he got back into his RMP and placed another phone call. He said that the RMP was about ten feet from the ambulance and that no one was holding him. As he was talking on the phone, Sergeant Rodriguez came over to him and told him that he was ordered to go back to the station house.

Respondent said he was about to walk to the RMP when Valenzano came to the other side of the vehicle and told ESU personnel that he was a EDP and if he does not give them the gun, to "EDP him." He explained that this meant he was to be treated as an emotionally disturbed person.

Respondent stated that at that time he became angry again and started screaming at Valenzano. He stated that he told Valenzano, "Why don't you come take it from me? What the heck is your problem?"

After that, he said, two ESU officers came in. Sergeant Rodriguez, Almonte, Aquino and possibly Marrero were there. He went to the RMP and sat in it. He said he followed the directive he was given to report back to the station house.

Respondent said that in the RMP there were ESU officers on either side of him. They told him that Valenzano wanted his gun. He said:

[B]ecause I thought that they were telling me that I have to give the Lieutenant my guns, and I said: No. I'm not giving them to him. He just assaulted me and I'm not giving him my guns.

He was then told that they had been given an order to get his guns or treat him as an EDP. They said they knew he was not an EDP and that he could give the guns to them or the delegate. He then gave them his guns in less than a minute.

He said that while he was sitting in the RMP with Aquino and Marrero, Valenzano came by and said something to him about the guns and Respondent said he started screaming at him again saying "...what the fuck is your problem? You put your hands on me."

He went back to the precinct and was advised by the PBA delegate that he was being suspended. He passed Valenzano in the station house but there was no exchange.

He said the entire incident from the ambulance until he went to the station house took three or four minutes, no more than five.

He said the reason they had been assigned to the checkpoint was because his partner did not meet his numbers, meaning twenty and one the prior month. He reasserted his plea of not guilty as to each of the six specifications related to this date.

At this point a recording previously received in evidence without objection was played, (RX G).⁹

In describing the audio recording, Respondent agreed that there had been an interchange between himself and Valenzano and then there was no communication. He agreed that there was a second outburst by him and he explained that this was when Valenzano put his hands on him. He said that line 9 of the transcript occurred while he was outside the back of the ambulance. He said his outburst occurred because he had heard Valenzano tell ESU to "EDP that motherfucker."

On cross-examination, Respondent agreed that he issued the two summonses numbered 431847973 and 431847975, dated for April 24, 2009 (DX 1 & 2). He stated that not only did he admit that he did not see the offenses but that he reported the matter. He agreed that he wrote the factual portion of the summonses himself. He agreed that he had not asked anyone for direction as to how to fill out the summonses. He said he did what he was told to do by McHugh. He knew that doing what he did by filling out these summonses could subject him to criminal prosecution.

He agreed that he filled out the summonses because he was ordered to do so. He was not aware of McHugh appearing in court regarding summonses issued by other

⁹ The recording was played at this time because a corrected transcript (RX-G1) was made available.

officers in the 41 Precinct. He did not recall telling IAB about Valenzano's directive not to issue summonses on information and belief.

With regard to December 12, 2009, he agreed that Officer [REDACTED] was taken into an ambulance that arrived at the scene. Respondent agreed that he got into the ambulance because he expected to go to the hospital with him because he has been his partner for several years. He also agreed that he was concerned for Officer [REDACTED] well being. He agreed that he heard Valenzano tell him that he had a sector going with [REDACTED].

He agreed that Valenzano told him to get out of the ambulance but he could not recall if Valenzano was in the entrance to the ambulance, but he said he was certain he was somewhere where he could hear him. When Valenzano first told him to get out of the ambulance, Respondent said he asked the officer next to him what was said because he could not understand what had been said. But when Valenzano repeated himself Respondent said he stepped out of the ambulance. At that time, Valenzano was four to five feet from the entrance. He did not know why he could not go with his partner but denied that he was disturbed about this. He asked why he could not go. He said he did not go back to the ambulance.

Respondent acknowledged that he was concerned about his partner and that he had decided that he would go with his partner regardless of what Valenzano said. He agreed he said to Valenzano that he could as he pleased because he was going with his partner.

He agreed that at that point, he attempted to get past Valenzano onto the ambulance although stating that he was in front of him. It was at this point he said that

Valenzano put his hands on him. Respondent said that he was "touched" and then added that he was "assaulted by him." He said Valenzano "grabbed him." He said he did not know why Valenzano grabbed him. Respondent acknowledged that when he got out of the ambulance, Valenzano was four or five feet from him and that he got right in Valenzano's face and asked why he couldn't go with his partner. He said he was not upset and spoke in a low tone of voice. Respondent agreed that he was being insubordinate to Valenzano from the point at which he told him he could do as he pleased. He agreed that he refused to turn over his gun and shield to Valenzano and said he did so "because he touched me, he assaulted me." He denied telling Valenzano that he did not have the authority to take his gun and shield. He said he told Valenzano he did not have the authority to put his hands on him.

Respondent stated:

I never challenged his authority. I just said that he put his hands on me and that's why I reacted the way I reacted. I gave my gun and shield because he ordered me to give my gun and shield. I went to the stationhouse because he ordered me to go to the stationhouse. I went to the RMP because he ordered me to go to the RMP. So what did I disobey?

Respondent acknowledged that when Valenzano first asked him for his gun and shield he did not immediately comply. Respondent volunteered that Valenzano asked for the gun and shield a few times. He denied that Sergeant Rodriguez ever asked him for his gun and shield. When asked if his conduct on the audio tape was appropriate for a New York City police officer Respondent stated, "I was assaulted." When asked again he said, "I wouldn't know whether it was appropriate or not. I was acting on a reaction of his putting his hands on me."

When asked by the Court to describe the assault, Respondent stated:

I'm far. At this point, I am in the back of the RMP making the phone call. Then I approach him. He's over here. The entrance of the ambulance is here. I come to Lieutenant Valenzano, and I get close to him and I tell him, Lieutenant, you can do as you please, I'm going with my partner. And he asked me what. I said, you can do as you please, I am going with my partner. As I tried to turn to go to the ambulance, I guess at that point I would have disobeyed the order, as I turned to go to the ambulance I feel a hand that grabbed me, and said give me your gun and shield. As I'm twisting, I feel another hand, and he twists me. He took my whole body, turned it.

When asked by the Court if he was saying that Valenzano put his hands on both of his shoulders and turned him, Respondent stated:

Yes and turned me around. Give me your gun and shield and report to the stationhouse. At that point, when I turned around, out of instinct, it was not I can honestly say I did not even know it was the lieutenant who had his hands on me. I knew I had my hands on me, and my reaction was to push. I didn't punch, I didn't strike, I pushed his hands off of me.

Respondent acknowledged that he did not turn over his gun and shield at that point and that that was the extent of the physical contact.

Respondent agreed that as he was turned around he heard someone ask for his gun and shield. When asked if he knew that person was someone in position of authority Respondent stated, "yes but not with his hands on me." Respondent agreed that he works in a paramilitary organization.

On re-direct examination, Respondent stated that he never heard Valenzano tell him to come out of the ambulance. He said that when he meant he got in his face he was two or three feet away. When asked by the Court he said he was not referring to the incident he had just described a few minutes earlier. He said that when he got out of the

ambulance and went to Valenzano and asked him if he could go with his partner. When asked by the Court if that was the time they were in each others' face Respondent said "No I just came to his face to just ask him that, then I left." On further questioning by the Court, Respondent agreed that there was one point in time when they were face to face.

Respondent then explained that the first incident in which he was in Valenzano's face occurred when he asked why he could not go with his partner which occurred he said immediately after he got off the ambulance. The second incident in which he was in Valenzano's face was almost three to four minutes later "after he got off the ambulance after he made the phone calls." He clarified that that is when he got close to Valenzano and told him that he could do as he pleases and that he is going with his partner.

Respondent said it was not a matter of Valenzano placing his hands on his shoulders. He said Valenzano grabbed him he felt one hand between his vest and his skin. He said the hands were not on his shoulders.

On further re-direct examination, regarding the summons issue Respondent said he reported the matter to IAB in September or October of 2009. He said he did it directly and indirectly. He said Valenzano had ordered him to write the summonses as he did which occurred probably two weeks prior to the incident.

On re-cross examination, Respondent acknowledged that he did not recall if he mentioned Valenzano's directive at his official Department interview.

When questioned by the Court, Respondent agreed that at some point he went to the RMP. When asked how long he was there before he turned over his firearm, Respondent stated five or six minutes after the pushing incident. He said Valenzano had given an order to ESU to remove his firearm and he knew he had the authority to do that.

He said he gave ESU the gun. With regard to the second gun he said: "I gave it to them. It was one minute in between I had a gun." He acknowledged it was not all at one time and that it was "maybe 30 seconds apart."

Asked if he recalled that the ESU officer testify that he had to ask separately for the second gun, Respondent stated, "I don't recall him asking, but I do recall that I gave it to him maybe seconds apart."

Sergeant Horacio Ortega

On December 12, 2009, Ortega had been assigned as an Investigator in the Bronx Investigations Unit. Ortega worked as an Investigator for approximately three years. Ortega currently works in the Bronx Task Force. On December 12, 2009, Ortega responded to the 41 Precinct having been alerted to an altercation between Respondent and Lieutenant Valenzano. Ortega interviewed several people at the scene and drafted a report based on his investigation.

Ortega's initial report concluded that Respondent had initiated the physical contact in the incident. Ortega based this conclusion on Valenzano informing him under oath that Respondent physically touched him first. But Ortega testified that he had changed his mind about his initial report's conclusions based on reviewing the transcript of the audio recording that was taken during the incident. Ortega read in the transcript that Respondent had repeatedly told Valenzano not to "f'ing" touch him. Ortega further testified that he now believed that the initial altercation occurred outside of the ambulance, instead of inside the ambulance as he had initially reported it based on his reading of the transcript.

Ortega was unable to recall whether Valenzano informed him that Respondent had called Valenzano a “white bitch.” Ortega was further unable to recall whether Sergeant Rodriguez told him that Sergeant Rodriguez had ordered the Respondent to surrender his gun and shield.

Ortega testified that he had not read the transcript from the audio tape until that day he testified on March 5, 2013. Ortega further testified that he could not recall if he had ever heard the audio recording that was associated with the investigation. But Ortega recalled being present at the official Department interview when Mr. Guzman, the Respondent’s attorney, handed over an audio Compact Disc (cd) to the officers. Ortega testified that he might have listened to the cd at that moment, but he could not recall as the file was “big... with many interviews.”

On cross-examination, Ortega testified that he conducted interviews about the incident on or around December 12, 2009. Ortega compiled those interviews and created a UF-49 based on the information gathered and interviews conducted. Ortega conducted subsequent interviews and added them to the investigative file. Ortega confirmed that he did not recall whether he listened to the cd recording that was provided by Respondent. Ortega admitted that it was someone’s responsibility to have listened to the cd upon it being handed over but he did not know if it was anyone’s responsibility to have transcribed it. Ortega handed over the investigation to another investigator who had more jurisdiction than him.

FINDINGS AND ANALYSISDisciplinary Case No. 2011-5089

The single specification in this case charges that Respondent "knowingly made a false statement, which he did not believe to be true." It further alleges this occurred, "in a written instrument bearing a legally authorized form notice stating that false statements are punishable." In specific, it alleges that Respondent, "acknowledged issuing two (2) Criminal Court Summons for violations he did not personally observe, and signing 'I personally observed the commission of the offense charged herein, false statements made herein are punishable as a Class A misdemeanor pursuant to section 210.45 of the NYS Penal Law, affirmed under penalty of Perjury,' on said Summonses."

The two summonses in question are in evidence. One of these summonses was issued to Elvin West and charges the Penal Law violation of Disorderly Conduct (DX 1). The other was issued to Bryan Lebron for the Health Code violation of failing to have a dog license, (DX 2). Respondent signed each of these summonses above a line both on the front and on the back that states "I personally observed the commission of the offense charged." On both the front and back, it is indicated that the statement is made as an affirmation under the penalty of perjury.

Respondent acknowledged signing those summonses but claimed that he did so on orders from his commanding officer. The Commanding Officer, McHugh, had no recollection of the two specific summonses in this case but agreed that "team led enforcement," occur in his command. He also testified that while he "generally never led the team led enforcement as Commanding Officer," he may have called Respondent to

the scene, "as I do with other officers to issue summonses." McHugh pointed out that Respondent could have issued the summonses on information and belief.¹⁰ McHugh noted that in the alternative Respondent could have asked him to sign the summonses.

Respondent counters this argument with a claim that Valenzano had previously told him and others not to issue summonses on information and belief so he felt compelled to issue it on personal knowledge.

Before sorting out these and other factual claims made regarding this incident it would be useful to review Patrol Guide rules and relevant law related to the issuance of criminal court summonses.

Patrol Guide Section 209-11 addresses the issue of how to prepare what is usually referred to as a C-summons or Criminal Court Summons. That section starts by calling that document an INFORMATION (underlining and capitalization as in the Patrol Guide). An Information is defined in the Criminal Procedure Law (CPL), is an accusatory instrument which can serve as the basis for commencement of a criminal court action and for the prosecution thereof in the local criminal court.¹¹ As Patrol Guide Section 209-11 points out that a properly completed Information would enable the court to issue a bench warrant for a defendant who failed to appear.

This section of the Patrol Guide also sets forth the following rules:

The INFORMATION must include eyewitness (non-hearsay) allegations of fact describing acts of the defendant.

An INFORMATION is not legally sufficient if the facts merely repeat the specific language of the law.

¹⁰ The way McHugh phrased this was, "[T]he officer would cross out I did not (*sic*) observe and initial it and sign, and then at court, I come down and testify as the observing, apprehending officer. He's the arresting officer."

¹¹ To meet the "and prosecution thereof" requirement an Information would, among other things have to be a non-hearsay document.

The INFORMATION must be signed by the uniformed member or civilian complainant and the date must be entered.

A summons will not be issued by uniformed members for violations not personally observed.

(Underlining and capitalizations are as in the Patrol Guide)

The section goes on to note that if a member of the service witnesses a misdemeanor then he or she will sign the Information. If the member did not witness the misdemeanor being committed then the civilian complainant should sign the Information. If the civilian declines to do so then the Patrol Guide section allows the officer to fill out the form "on information and belief."

Again it should be noted that this practice is permitted only where the offense involved is a crime, specifically a misdemeanor.¹²

It is now necessary to look at the specification itself. The specification does not allege any Patrol Guide violation but references itself solely to a violation of Penal Law Section 210.45, "Making a punishable false written statement" which is a class A misdemeanor. In the opening phrase of the specification, it alleges that Respondent "knowingly made a false statement, which he did not believe to be true." This is a repetition of the statutory language but has in this case the potential to be misleading. Respondent is not charged with lying about the events alleged in the summons nor does Respondent claim that he was asked to falsely issue a summons. He is charged with being untruthful about the printed statement on the summons that the factual allegations

¹² This "information and belief" provision seems to conflict with the CPL. As noted previously the CPL provides that an Information is an accusatory instrument which can serve as the basis for prosecution of a criminal court action in a local criminal court. Such prosecution can only occur when a non-hearsay affidavit has been filed, (see CPL 100.10 (1); 100.40 (1)(c) and 100.15 (3)). There are further problems with this provision as the court parts where summonses are returnable generally are not set up for the filing of supporting depositions, nor under the circumstances described, could one expect that a supporting deposition could ever be obtained.

were based on his personal observations. Respondent admits to this. Indeed he brought it to the attention of the investigators. His defense is that he was ordered to do so.

Certainly if McHugh ordered Respondent to write a summons for a violation which McHugh had observed he would have been ordering Respondent to engage in conduct which might violate the Patrol Guide.

To understand this better it is helpful to look at a hypothetical situation. If an officer in the rank of captain or above saw a person, to use an example from the Patrol Guide, sitting in the roadway blocking traffic, he would be creating a dilemma for an officer if he ordered that officer to the scene after that person had been removed from the roadway and then further ordered that officer to write a summons for Disorderly Conduct. Disorderly Conduct is a violation; the officer did not witness it. If the officer wrote the summons, "on information and belief," that would violate the Patrol Guide. If the officer wrote that summons up on personal observation, that would violate both the Patrol Guide and the Penal Law. The only option for such an officer would be to ask the captain to sign the complaint. Under those circumstances the captain, would have some concomitant responsibility to make sure the officer knew that he or she was available to sign as the witness and to further make sure that he or she in fact signed the summons he or she had ordered the officer to issue.

If on the other hand, the captain and the officer, in our hypothetical, arrived on the scene at the same time, and the officer was capable of making the observation him or herself, there would be no problem with either the Penal Law or the Patrol Guide as the officer could honestly write the summons on personal observation.

The summonses related to the unlicensed dog would seem logically to fit into this second category. If McHugh saw a man with an unlicensed dog, then Respondent could be brought to the scene and make his own observations about the man, the dog and the license.

The problem with this summise is that there are no facts in the record to support it. During the trial, Respondent was not asked by any attorney about the details of what occurred. However, Respondent was asked about the facts surrounding the issuance of these summonses during his official Department interview and the audio and transcript of that interview were placed in evidence (Court Exhibit [CX] 1 and 2).

Respondent's statement at the interview was that he had been on patrol with his partner, Officer [REDACTED] when they were called to a location because McHugh and a captain wanted them there. When he arrived, there were approximately six men against a wall. He and Officer [REDACTED] were directed to issue summonses to the men. Some were assigned to Officer [REDACTED] some to him. Respondent said that McHugh gave him specific order to write the summonses for no dog license. Respondent did not recall seeing a dog. He did not believe the handwriting on the summons was his although he did acknowledge signing the summons and conducting a warrant check. He also said that he was ordered by McHugh to issue the Disorderly Conduct summons.

In determining the facts of this case, it should be noted that this Court is bound by the facts set forth by Respondent. There are several reasons for this. The first is that neither side produced any other witness to this event. McHugh did not have a specific recollection but acknowledged that essentially the scenario presented by Respondent

could have occurred. Cutter testified that Officer [REDACTED] did not recall the events. Respondent's testimony about what occurred is all we have.

The second reason this Court is bound to accept Respondent's testimony is that the Department is relying on Respondent's statements, which in fact comprise the only evidence to support the charge. The Department therefore is accepting if not vouching for Respondent's credibility in this matter.

The Department relies on the premise that Respondent admitted to signing these summonses as being based on his personal observations when he also admitted that he did not make the observations. The Department asserts that this is basically an open and shut case but Respondent claims that he was ordered to issue these summonses and in this Department when a police officer is given an order by a captain he must obey that order.

Further complicating the matter is the fact that McHugh offered an inadequate explanation about how the summonses could have been properly issued. While McHugh said that he sometimes filled out and signed summonses provided by officers, or signed summonses filled out by officers he also acknowledged that he was aware that officers in his command were issuing summonses on information and belief. He went on to assert that no prosecutor complained about this practice nor was he aware that summonses were dismissed for this.

McHugh could not properly expect Respondent or any officer to issue a summons for a violation on information and belief. Both of the summonses in this case were for violations.

If he expected an officer to issue a summons for a violation, which only he had witnessed, he had a responsibility to make sure that he was named as the witness on the

summons and then he would have had a further responsibility to make sure that the summons was presented to him for his signature.¹³

In the alternative, if the violation was observable by the officer who had been ordered to issue the summons, he had an obligation to make sure that officer so ordered actually saw the offense.

There is a separate issue with regard to the summons for Disorderly Conduct. This summons appears to be defective on its face. All that was written in the factual portion of the summons was that the individual charged committed the above mentioned offense. What is written above is not clear but it appears simply to be a recitation of title of the Penal Law section (240.20). As has been noted, Patrol Guide 209-11 states that, "An INFORMATION is not legally sufficient if the facts merely repeat the specific language of the law." Thus this summons was not in compliance with either the CPL or the Patrol Guide.

During this trial, the issue of an alleged quota of twenty summonses per month was raised by Respondent's counsel. As I noted during the trial, that issue has no relevance to the charges in this case. A precinct commander such as McHugh has the right and indeed the responsibility to insure that officers under his command are aware of and attentive to violations of law. As noted in this decision, a superior officer can order a subordinate to issue a summons. The key is that it must be done properly on both the part of the superior and the subordinate officer.

During his official Department interview, Respondent was asked if he realized he was committing a crime by signing these summonses. He replied that he was following

¹³ As previously noted, McHugh testified that he sometimes filled out the back of the summons. If he had the summons in his hand and filled out the facts, he could have and perhaps should have signed the summons at that time, something that he did not mention doing.

an order and relying on the fact that he was being given the order by a more experienced superior officer and he therefore, did not believe that he was committing a crime. While that may or not be true it is also apparent that McHugh did not have a clear idea of what was authorized by the Patrol Guide and what was not authorized.

McHugh also testified that he had a review process to insure that the summonses were properly issued but the existence of the facially defective Disorderly Conduct summons indicates that this process was inadequate.

Given this lack of understanding of what the Patrol Guide requires and the apparent lack of effective review of the summonses issued, particularly for ordered summonses, it is difficult to see why Respondent alone should be held accountable.

Further there is no evidence that Respondent intended or wanted to sign a false affidavit, indeed, the evidence supports the notion that he was acting under orders. This tribunal has often held that an officer must obey an order and essentially "grieve" later. Considering all of these circumstances, Respondent's defense should be credited and Respondent found not guilty.

Several other issues were raised during the trial and merits mention. One is the claim by Respondent that he was instructed by Valenzano not to issue summonses "on information and belief." There is no evidence to support this claim. Respondent appears to have raised this for the first time at trial. He did not elicit testimony from any other officer that anything like this occurred.¹⁴

¹⁴ Indeed, his witness Boyce, confirmed that officers in the command issued summonses on information and belief.

But in the end the issue is irrelevant. As I have already noted, the Patrol Guide prohibits hearsay accusatory instruments where the charge is a violation and the CPL does not provide for a hearsay accusatory instrument with regard to a violation.

Another issue was raised during the trial was the timeliness of Respondent's revelation about the summonses. This was done by the Assistant Department Advocate (Advocate) in his closing arguments. But the subject was explored by Cutter during the official Department interview. During that interview Cutter pointed out to Respondent that a great period of time had passed between the issuance of these summonses in April 2009 and the date of that interview on April 21, 2011. Respondent told Cutter that he believed he had reported this matter in an anonymous letter he had sent to IAB shortly after the incident.¹⁵

That anonymous letter is in evidence in this proceeding (RX A) and in it, along with many other complaints, is mention of the fact that he had been ordered to prepare summonses for events that he had not witnessed. Respondent claimed to have sent that letter in November 2009 and Cutter acknowledged that the original investigation of the complaint commenced in December 2009. Respondent also claimed to have anonymously notified his ICO and IAB by phone in September or October 2009. Cutter also recalled that Respondent stated he did not report the matter sooner because he had said he was afraid.

In any event, Respondent is not charged with failing to promptly report this matter to IAB and he did in fact raise the issue which triggered an investigation in 2009.

¹⁵ This testimony is similar to testimony given at trial. The issue at trial, however, was whether Respondent had reported Valenzano's alleged order not to write summonses on information and belief. Valenzano's order is not mentioned in the compliant letter. The issue at the official Department interview was whether he had reported being ordered to improperly write summonses he had not observed, which was in that letter.

There is another far more significant matter that, while not specifically raised by counsel, is apparent from the manner in which the alleged misconduct came to light. According to Cutter, Respondent was interviewed by IAB because of a complaint that he had filed. During his interview and as part of his evidence that he was compelled to issue summonses for events he did not witness, Respondent produced the two summonses and informed Cutter that he did not witness the offenses charged. At that point, Cutter testified, Respondent changed from a complaining witness to a subject.

There is no provision in the Patrol Guide that a member of the service who brings a complaint to IAB is entitled to transactional or even testimonial immunity with regard to Departmental charges¹⁶ but great care must be applied when turning a complainant into a subject based on information he or she has provided. The obvious reason is that to do so has significant potential to create a chilling effect, dissuading uniform and civilian members of the service from coming forward to IAB.

This is not to say that everyone should receive protection. A member of service who, for example, comes into IAB to evade responsibility or improperly shift responsibility to someone else, or who has set someone up, should probably not get any benefit for coming forward.

In this case, it is clear that some of Respondent's complaint was directed at McHugh. But there is no evidence that Respondent purposefully prepared these summonses to get McHugh in trouble. On the contrary, while McHugh did not have

¹⁶ Transactional immunity would confer immunity from prosecution for the entire transaction. Testimonial immunity would prevent a prosecutor from using the witness's testimony against him or her. It would permit the prosecutor to find other evidence and prosecute the transaction with that independent evidence. In this case neither form of immunity was granted. The case entirely rests on Respondent's own words.

specific recollection of the incident, his testimony generally indicated that what Respondent reported was accurate.

Right or wrong¹⁷ it appears that Respondent genuinely believed that he was reporting misconduct.

Under all of the circumstances the prosecution of this charge creates a chilling effect that outweighs any possible benefit. I therefore recommend that this specification be Dismissed.

Disciplinary Case No. 2010-456

The six specifications in this case all relate to an incident that occurred on December 12, 2009. On that day, Respondent and his partner [REDACTED] were assigned to be part of a traffic checkpoint. As they were setting up, [REDACTED] had chest pains and an ambulance was called to the scene.

As the ambulance arrived, a number of police units, including ESU, also arrived. Respondent was in the ambulance with his partner and expected to go with him to the hospital. Valenzano ordered him out of the ambulance. The events that followed are in dispute.

Many of the officers who were on the scene testified about the incident; Ryan, Kenny, Sergeant Rodriguez, Police Officer [REDACTED], Marrero, Aquino, Gomez, Captain Valenzano, Police Officer Almonte and EMT Guardon. Respondent also testified about the incident.

¹⁷ Cutter reported that the allegation against McHugh was deemed to be unfounded.

Every version seems to be in some respects different from the others. Certainly in a chaotic situation, people will remember things differently. The task, of course, is to try to determine as best we can what actually occurred.

There is also an audio recording made by Respondent which was received in evidence without objection. This audio recording (RX G) and accompanying transcript (RX G1) is not dispositive of all factual issues but it does confirm some parts of what occurred. To understand this, it is necessary to describe the audio.

The audio is of an event on the street with a good deal of background noise including sirens. Some things are clearly audible, others are not. The transcript which was apparently prepared by Respondent appears to be quite accurate with regard to what can be heard but, as will be discussed in more detail later in this decision, not everything that was said can be heard. The transcript also has time marker which more or less match the digital recording timer.¹⁸

It is possible using all of the testimony and the recording to attempt to piece the incident together.

As I have noted, there is no question that Officer [REDACTED], Respondent's partner, suffered from some kind of chest pains while they were working a vehicle checkpoint. There is no question that an ambulance and other police units including ESU arrived on the scene.

There is no question that Officer [REDACTED] was taken into the ambulance and the Respondent was either all or partway in the ambulance with him. There is also no question that Valenzano had decided that Respondent should not accompany Officer

¹⁸ There are a few stray commentaries in the transcript such as "(acknowledge tone of voice)," (pg 1 at 00:20). But these can be easily be distinguished from the actual transcription of what was said.

[REDACTED] to the hospital and that he had assigned a sector car to handle that task. There is also no question that the officers involved were Almonte and Restrepo and that Almonte was to go in the ambulance while Restrepo travelled in the RMP.

There is also no question that Respondent learned that he was not going with his partner to the hospital and that he was to leave the ambulance. The first point of contention is whether he left the ambulance as directed or whether he refused to follow the order to leave the ambulance.

It would appear that only one person, Valenzano, testified that Respondent refused to obey his order to leave the ambulance. None of the Department witnesses who were in and about the scene and who might have been in a position to see or hear Respondent refuse to leave the ambulance testified about a refusal. Respondent's witnesses, Officer [REDACTED] and Almonte said he left the ambulance without resisting any order to leave.

At the beginning of the audio recording someone, presumably Valenzano, can be heard telling Respondent that he is not going and that he has a "sector" going. Someone, presumably Respondent, can be heard asking if there is a reason he cannot go with his partner and repeating the question. The other person repeats that he has the "sector" going. Then the sound of a siren dominates.

The audio recording certainly confirms that there was a heated back and forth on the issue of whether Respondent could go with his partner but there is no specific argument or even discussion about leaving the ambulance. Respondent testified that as he left the ambulance, he "got into Valenzano's face" and asked why he could not go with his partner. He then went off to the side, called his partner's family and left a

message for them. He then went over to Valenzano and again “got in his face” and the heated argument began.

As will be discussed further in this decision, the evidence would suggest that Respondent left the ambulance as directed.

Most of the officers that testified about the incident first took note of the situation between Valenzano and Respondent at the point in which there was a heated and loud argument between them with some kind of physical contact.

The next question is when that confrontation occurred. Valenzano and Sergeant Rodriguez testified it happened as Respondent was leaving the ambulance. Because the other officers were not focused on these two until the outburst, there is little testimony about what happened before that angry outburst. In this instance, the audio is helpful.

After the mention of the “sector” and Respondent asking why he could not go with his partner, there was a hiatus of almost two minutes before Respondent can be heard speaking in Spanish and saying to someone “it is very important that you call me back.” There is another pause of almost a minute before the loud and heated argument began. This would tend to confirm that Respondent made the call as he described and that there was a pause between the time Respondent was told that the sector (car) was going and the time the heated argument began.

As to what happened next, Respondent himself said that after he made the phone call, he went back to Valenzano and again “got in his face.” On the audio a voice, presumably Respondent’s, can be heard saying, “You can do as you please I’m going with my partner. You can do as you please I am going with my partner.”

This would tend to confirm Respondent's testimony that he went to Valenzano and "got in his face." It is also clearly the start of the confrontation that is at the center of the charges.

On the audio, the next thing that can be heard is another voice, presumably Valenzano's saying, "Polanco give me your shield, give me your firearms." Then repeating more loudly, "Polanco, give me your (inaudible)." Then, "Polanco report back to the stationhouse immediately. Report to the station immediately."

The next thing that can be heard is a voice, again presumably Respondent's saying, "What the fuck you touching me for? What the fuck you touching me for?" Then "stop fuckin touching me, stop fuckin touching."

The next voice that can be heard said "whoa, whoa... Whoa, whoa, whoa." At that point, a number of other voices can be heard trying to calm Respondent down. For the next two minutes or so, voices can be heard trying to calm Respondent down, telling him to "chill" to think of his children, to keep his eye on the ball and other such things.

Respondent testified about what happened after he told Valenzano that he was going with his partner and he (Valenzano) could do what he pleased:

As I tried to turn to go to the ambulance, I guess at that point I would have disobeyed the order, as I turned to go to the ambulance I feel a hand that grabbed me and said give me your gun and shield.

Respondent testified that he felt someone twist him and turn his whole body. He testified that he did not know it was Valenzano who had his hands on him but his reaction, he said, was to push, stating, "I didn't punch, I didn't strike, I pushed his hands off of me."

The testimony of the various witnesses to what they observed varies. Ryan stated that his attention was drawn to the situation with Respondent and Valenzano because of the raised voices and yelling (which can certainly be heard on the audio). He said he did not see any fighting but saw Respondent with raised hands toward Valenzano.

Kenny testified that he saw Respondent to be irate and upset. Kenny said that he observed yelling and that Respondent tried to lunge at Valenzano while Valenzano stepped back. Kenny testified that he got in between the two and he, along with other officers, restrained Respondent who, he said was very upset. He said approximately three officers were holding Respondent by his torso. Kenny also testified that he never observed Respondent strike Valenzano.

Guardon said that Valenzano placed his hand on Respondent's shoulder and Respondent pushed it away. He described Valenzano's action as not involving force and he described Respondent's act as "like a defensive push." They were then separated by other officers.

Sergeant Rodriguez described the contact Respondent made with Valenzano as "a shove," an "aggressive push." He said that Valenzano backed off after being pushed by Respondent.

Marrero testified that as Respondent was approaching the ambulance, Valenzano blocked his path, grabbed him by the shoulders and arms and turned him around physically. Respondent, he said, slapped Valenzano's hands off his arms.

Aquino said only that there had been an angry exchange of words between Respondent and Valenzano and that they were two to three feet away from each other when he saw them.

Gomez said that he was in the back of the ambulance when he heard a commotion. Gomez testified that he saw Respondent turn around and push Valenzano, telling him to get his fucking hands off of him. Gomez said that he and others told Respondent to calm down and that this was not the way to do things. He described Respondent as upset but not "charging."

The other two officers who were on the scene, Officer [REDACTED] and Almonte did not see the confrontation between Respondent and Valenzano.

All of the witnesses and Respondent agree that, after Respondent and Valenzano were separated, Respondent was escorted to an RMP and that while he was in the RMP he gave his firearms to ESU officers.

Specification No. 1 alleges that Respondent, "having been directed, on (2) occasions, by New York City Police Department Lieutenant Andrew Valenzano ... to exit the ambulance he was in and that another Member of Service would escort his partner to the hospital, did fail and neglect to comply with said directive."

This charge is based solely on Valenzano's testimony. Only one Department witness, Sergeant Rodriguez, seems to support this allegation. However when his full testimony is examined, he did not say that Respondent refused to follow Valenzano's order to get out of the ambulance. What he said was that as Respondent left the ambulance, he lunged at Valenzano. In the end, no Department witness provided testimony which supports the claim that Respondent refused to exit the ambulance even once let alone on two occasions. On the other hand, Respondent offered two witnesses who contradicted the claim and said Respondent left the ambulance as directed.

Perhaps the most interesting witness on this issue was Ortega who, having been called by Respondent, testified that he was one of the officers who investigated this case. Without objection, he offered his opinion about this matter.

Ortega said that when he investigated the case, he believed that Respondent had refused the order to exit the ambulance but after reading the transcript of the audio recording, which he did on the morning of his testimony in this proceeding, he changed his mind. Ortega's opinion is not binding on this Court which has the responsibility to make determinations of fact. What is startling about this testimony is that Ortega acknowledged that he had access to the audio recording but he could not recall if he listened to it at any time before coming to his earlier conclusion, (see Ortega's report dated November 30, 2010, RX E).

As noted earlier in this report, there is no evidence on the audio recording of an argument over Respondent leaving the ambulance. A voice, presumably Valenzano's, can be heard saying that he had a "sector" going. Then, a period of several minutes passed before the argument between Respondent and Valenzano began. During that period, Respondent can be heard apparently leaving a telephone message in Spanish telling someone that he had an important message and to call him back.

All of this would tend to confirm Respondent's claim that he got out of the ambulance and went off to the side to make a phone call to Officer [REDACTED] family before he went back to confront Valenzano.

Valenzano acknowledged that he had listened to the audio recording but no explanation was offered by him as to the apparent discrepancy between what he said and

the audio. Because of the many and complex issues in this case, I ordered written closing arguments.

In his closing, the Advocate, apparently recognizing the obvious problem with this allegation, argued essentially that it makes no difference “whether Respondent refused to immediately debark from the ambulance, or exited the ambulance and then sought to re-board” as his intent was to go with Officer Rodriguez in defiance of Valenzano’s order.

I respectfully disagree with the Advocate. “It is well settled that the principles of due process applicable to criminal trials apply to government administrative proceedings,” Wolfe v. Kelly, 79 A.D.3d 406, 409 (1st Dept. 2010). “Chief among the principles of due process is notice of the charges (*Matter of Murray v Murphy*, 24 NY2d at 157). In the context of an administrative hearing, the charges need to be ‘reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him ... and to allow for the preparation of an adequate defense’ (*Matter of Block v Ambach*, 73 NY2d 323, 333, 537 NE2d 181, 540 NYS2d 6 [1989]). Thus, the specificity of the notice of charges required varies from case to case, but it must be specific enough to give actual notice to the party being charged” Wolfe, 79 A.D. 3d at 410.

The charge specifically alleges that Respondent twice refused orders from Valenzano to leave the ambulance. It is clear that the theory of this charge is based on Valenzano’s claim that while Respondent was in the ambulance he was ordered to leave and refused. To allow the broad interpretation suggested by the Advocate would in effect alter the

allegation and thus constitute a violation of due process. The Department cannot prove what it alleged and thus Respondent is found Not Guilty of Specification No. 1.

Specification No. 2 alleges that Respondent, "was discourteous to on duty New York City Police Department Lieutenant Andrew Valenzano ... to wit: after said Lieutenant directed said Police Officer to exit the ambulance, said Police Officer did become irate and stated, "I'm going with my partner. Lieutenant Valenzano you do what you have to do, I'm going with him."

There is no question that the beginning portion of this specification refers to the alleged order by Valenzano for Respondent to leave the ambulance, but that is not what the charge is about. The conduct this specification addresses is the action of Respondent in telling Valenzano that he was going with his partner and Valenzano should do what he had to do. Several witnesses testified that this is what occurred, words incredibly close to this can be heard on the audio recording and Respondent admits to this conduct. Indeed he testified that at this point he was disobeying an order. Respondent is found Guilty of Specification No. 2.

Specification No. 3 alleges that Respondent after having been directed by New York City Police Department Lieutenant Andrew Valenzano to surrender his gun and shield and to return to the stationhouse, did fail and neglect to comply with said directive.

Once again the facts are not really in dispute. Several witnesses testified that Valenzano ordered Respondent to surrender his firearm and shield. Valenzano can be heard on the audio recording giving that order. There is also no question that Respondent did not immediately comply.

Respondent has offered several explanations. At one point he said it would have been dangerous to do so at that moment as he and Valenzano were arguing and other officers would misunderstand. At another point, he said he was not going to give Valenzano the firearm because Valenzano had just assaulted him. At yet another point, he said that he complied with the order because he turned over the gun and shield while he was seated in the RMP.

These explanations are without merit. The order to surrender firearm and shield has obvious significance and needs to be complied with, without delay. Respondent could have easily turned over the firearms safely. What he needed to do was to verbally communicate that he was going to comply with the order and then physically either make the firearm available for someone else to remove from his person or handle it in a way that would communicate that his intent was to comply with surrender order and not to use the weapon aggressively.

His explanation that he was not turning over the firearm because he was the victim of an assault by Valenzano is also without merit. At the outset it must be said that Respondent complained of neither injury nor substantial pain, necessary elements of assault.

There seems to be little question that he was turned around by Valenzano but this was a problem of Respondent's own making. Respondent by his own testimony said that after making a phone call he went up to Valenzano got "in his face" and announced that he was disobeying an order. For Valenzano to have turned him around, Respondent would have had to have been heading to the ambulance that he was ordered not to enter.

Valenzano's action was taken to address this flagrant and intentional violation of his order. One cannot start a confrontation and then complain of the consequences.

The third defense; that he complied when he was in the RMP, only underscores the fact that he did not immediately comply with Valenzano's order. Even then as the audio recording confirms, when he was at the RMP his firearms were requested and he ignored that request.¹⁹ Moreover Ryan credibly testified that after surrendering his on duty firearm, Respondent delayed turning over a second firearm that he had on his person at the time.

There is a second item mentioned in this specification which claims that Respondent failed to comply with the order to go to the stationhouse. Unlike turning over a firearm, returning to the stationhouse could not be accomplished immediately. Respondent had to get into a vehicle. That happened and Respondent was taken to the stationhouse after his firearms were recovered. There is no indication anywhere in the record that Respondent resisted returning to the stationhouse.

Because Respondent failed to surrender his firearm as ordered, he is found Guilty in Part of Specification No. 3.

Specification No. 4 alleges that Respondent "was discourteous to on-duty New York City Police Department Lieutenant Andrew Valenzano ... to wit: after said Lieutenant directed said Police Officer to surrender his gun and shield, said Police Officer stated to said Lieutenant, 'You don't have the authority to do that.'"

¹⁹ On the transcript at 10:21 minutes into the recording, someone said, "He wants firearms. Polanco. (inaudible) wants the firearm. (inaudible). To which Respondent replies. "I'm not giving him them, I'm not giving (inaudible). The other voice: "He's giving an order." To which Respondent replies: "I'm going back to the command. I'm not following orders, I'm going back to (inaudible)."'

By his own admission Respondent made such a statement to Valenzano. Respondent claims that he was telling Valenzano that he did not have authority to put his hands on him.

The phrase "you don't have authority to do that" or words to that effect do not appear in the transcript of the audio recording and cannot be heard on that recording but Respondent's admission is sufficient to establish the fact that he said it. The fact that he said it is also confirmed by several witnesses, specifically, Valenzano and Guardon.

What this demonstrates is that the recorder did not pick up everything that was said or that some things were drowned out by other sounds or was simply inaudible. But the audio recording is helpful. Respondent can be heard complaining on the audio recording about Valenzano touching him so he addressed that issue directly.

The testimony, including Respondent's own statement, indicated that after Respondent was told to turn over his firearm he said "you don't have the authority to do that." As has already been noted in this decision, Respondent made clear that he did not wish to turn his firearms over to Valenzano. A fair interpretation of "you don't have authority" statement, given the entire context of the incident, is that Respondent was referring to Valenzano's demand for his firearm and shield. Respondent is found Guilty of Specification No. 4.

Specification No. 5 alleges that Respondent "did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer did yell at and push New York City Police Department Lieutenant Andrew Valenzano, ... with both hands on said Lieutenant's chest."

There is no question that Respondent yelled at Valenzano. It can be heard clearly on the audio recording Respondent placed in evidence and there is ample testimony that this occurred.

As to the "pushing" charge, Valenzano testified that Respondent pushed him in the chest with two hands. His testimony is supported by Sergeant Rodriguez, who said that Respondent gave Valenzano "a shove" and an "aggressive push" in Valenzano's chest area. Sergeant Rodriguez added, when questioned on cross-examination, that Respondent used two hands to shove Valenzano.

Respondent said several things about the "pushing" issue. At one point he claimed that he merely pushed Valenzano's hands off of him. He said that it was basically a reflexive reaction and that he did not know who had grabbed him. At another point however he acknowledged that he pushed "straight at" Valenzano stating that he believed that it was at his chest and the purpose of this was to break his grip and at yet another point he admitted to pushing Valenzano with both hands on his chest.

Other witnesses who testified about this event were Marrero, Guardon and Gomez. Marrero described Respondent's action as slapping Valenzano's hands off of his arm. Guardon's initial testimony was that what Respondent did was to push Valenzano's hands off of him. However, when he was questioned further about this incident, he said that Valenzano stepped forward because he had been pushed back by Respondent thus indicating that Respondent pushed Valenzano with sufficient force that Valenzano was moved backward.

One other witness testified about this event and that was Gomez, who said that when he heard the argument he looked around and saw Respondent turn around and

"push" Valenzano while saying "Get your fucking hands off me." Neither side elicited further detail from Gomez.

Considering all of this testimony, including Respondent's own statement, it would appear that Respondent both pushed or slapped Valenzano's hands to release Valenzano hold on him and that he pushed him in the chest as well. Whether this occurred as two separate actions, or part of one motion is not clear but certainly pushing Valenzano in the chest was part of what occurred. Respondent is found Guilty of Specification No. 5.

Specification No. 6 alleges that Respondent "after having been directed to do so by New York City Police Department Sergeant Robert Rodriguez ... to surrender his gun, did fail and neglect to comply with said directive."

Sergeant Rodriguez testified that he asked Respondent to turn over his firearm and shield and that Respondent did not respond to him. Respondent denied that this occurred.

There is no reason or motive I can see for Sergeant Rodriguez to have lied about this. On the other hand Respondent repeatedly refused to turn over his firearm and shield. The audio recording makes clear that even after Respondent was at the RMP he was refusing to obey the order to turn over his firearm and shield and he said he was cognizant to the fact that he was disobeying an order.

There is no place on the audio recording where Sergeant Rodriguez can be heard to ask for the firearm but as I noted earlier it is clear that not everything was audible or picked up on the audio recording.

Sergeant Rodriguez's testimony is wholly consistent with the other known facts regarding the incident. His testimony on this issue is believable and Respondent is found Guilty of Specification No. 6.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). The Respondent was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found guilty of a number of acts of misconduct related to an incident that occurred on December 12, 2009. To assess an appropriate penalty consideration must be given to the entire incident.

It is clear from all the testimony in this case that Respondent was upset with practices and procedures in the precinct related to the issuance of summonses. He was assigned to a vehicle checkpoint which is obviously an assignment where an officer could be expected to find violations and write summonses. While on that assignment Respondent's partner Officer [REDACTED] became ill and an ambulance was called. Respondent wanted to accompany his partner in the ambulance and to the hospital. Valenzano did not permit that and assigned other officers to go with Officer [REDACTED]. Respondent was obviously bitterly unhappy and angry about the order.

Valenzano as an on-duty lieutenant dealing with on-duty officers did not have to give a reason for the order for it to have been obeyed. At the disciplinary trial,

Valenzano was asked for his reason and he likened the situation to the surgeon would not ordinarily operate on a family member. The point is that a police officer escorting someone to the hospital needs to be dispassionate. It is a very reasonable explanation and clearly Respondent was not dispassionate.

Evidence of the importance of the need for a dispassionate escort is actually found on the audio recording where officers were having a difficult time calming Respondent down. Among other things they had to remind him to think of his partner. Respondent was so angry that he potentially allowed his own needs to get in the way of getting his partner to the hospital for treatment. Having someone as emotionally charged as Respondent clearly was, in the ambulance could pose a danger to the person in need of help.

Respondent, after he left the ambulance and made a phone call, had an opportunity to calm down and figure out how to reasonably deal with the situation. Instead he rushed over to Valenzano and in his own words "got in his face." This is aggressive and hostile conduct and wholly inappropriate for a police officer. He then declared that he was going to the hospital in defiance of the order he had received and apparently was on the way to do that when Valenzano turned him around.

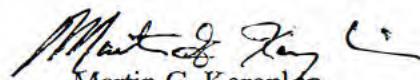
What is striking about the audio recording is how loud, angry and out of control Respondent was. It is apparent that officers on the scene had to work very hard to calm him down. In the course of this outburst he was disrespectful and refused several orders to turn over his firearm.

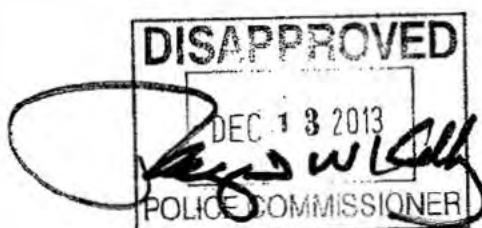
The Advocate has recommended that Respondent be dismissed from the Department. In evaluating the penalty, I note that Respondent has not been found guilty

of several important charges that were originally lodged against him. Obviously what Respondent has been found guilty of are serious offenses; but I note that no weapons were displayed, no one was injured and in the end it was a singular, isolated, event. I have not been able to find a prior disciplinary case sufficiently on point to serve as precedent however; generally, Department precedent would suggest that dismissal is not an appropriate penalty under these circumstances.

I therefore recommend that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at anytime without further proceedings. In addition Respondent should be penalized with the loss of fifteen (15) vacation days. He should also forfeit 30 suspension days previously served.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner Trials



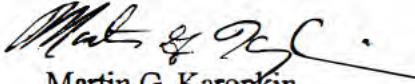
POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ADHYL POLANCO
TAX REGISTRY NO. 939237
DISCIPLINARY CASE NOS. 2010-456 & 2011-5089

In 2009 and 2012, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2008.

[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials